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No. 84-6646

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIE LLOYD TURNER, PETITIONER

v.

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 24, 1985
CERTIORARI GRANTED MAY 3, 1985

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TABLE OF CONTENTS

	Page
Docket Entries of the Circuit Court of Southampton County No. 86-79	1
Docket Entries of the United States District Court CA 83-501-N	4
Indictment of April 16, 1979	7
Proposed Questions on Voir Dire of Defendant	8
Reporter's Transcript of December 3, 1979, Proceedings in the Circuit Court of Northampton County (Motion to Dismiss) and Voir Dire Proceedings	10
Proceedings in the Circuit Court of Northampton County, December 6, 1979—Order of Trial Judge	18
Statement of Facts in the Circuit Court of Southampton County June 3, 1982	20
First Amended Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia	22
Brief in Response to Motion to Dismiss of the United States District Court for the Eastern District of Virginia November 1, 1983	24
Motion to Alter or Amend Judgment of the United States District Court for the Eastern District of Virginia	26
Appellant's Opening Brief in the United States Court of Appeals for the Fourth Circuit in No. 84-4004	30
Gross and Mauro Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization October 1983	33
Preliminary Tabulations Reflecting Arbitrariness and Discrimination under Post-Furman Capital Statutes of Bowers and Pierce of August 1979	44
Order Granting Petition for Writ of Certiorari dated May 13, 1985	70

TABLE OF CONTENTS—Continued

Page

Statutory Provisions from Code of Virginia, Section 18.2-31; 19.2-264.1; 19.2-264.2-.5 71

Opinion of the Supreme Court of Virginia in Turner v. Commonwealth, November 26, 1980, 273 S.E.2d, at 36 76

Memorandum Order Filed in the United States District Court May 23, 1984 97

Opinion of the United States Court of Appeals for the Fourth Circuit January 25, 1985, 753 F.2d 342 105

COMMONWEALTH OF VIRGINIA
IN THE CIRCUIT COURT
OF SOUTHAMPTON COUNTY

#86-79

COMMONWEALTH OF VIRGINIA

vs.

WILLIE LLOYD TURNER

[Filed Jun. 17, 1985]

RELEVANT DOCKET ENTRIES

Date	Name of Paper
April 16, 1979	Indictment
July 12, 1978	Warrant of Arrest
July 24, 1978	Request for & Order Appointing Attorneys
August 11, 1978	Motion for Psychiatric Exam.
August 28, 1978	Order for Psychiatric Exam.
September 7, 1978	Doctor's Report on Exam.
September 11, 1978	Order for More Extensive Exam.
September 11, 1978	Order of Objection
October 11, 1978	Report from Doctor on Exam.
November 13, 1978	Order re: Psychiatric Exam. of Defendant
April 16, 1979	Order Affirming Appointment of Attys.
April 16, 1979	Motion for Discovery & Inspection

Date	Name of Paper
April 16, 1979	Motion for Change of Venue with Affidavits Attached
April 16, 1979	Order Granting Motion for Discovery and Inspection and Change of Venue
September 13, 1979	Order for Continuance on Motion of Attys. for Def.
October 15, 1979	Order for Continuance on Motion of Attys. for Def.
December 3, 1979	Proposed Voir Dire Questions
December 3, 1979	Order Jury Trial Begun
December 4, 1979	Order Jury Trial Cont'd (Order of Conviction)
December 4, 1979	Jury Instructions: Granted: #1 thru #14 Refused: #13A, 13B, 13C, 13D
December 4, 1979	Jury Verdict
December 5, 1979	Order (Jury to fix punishment)
December 6, 1979	Order Showing Jury Verdict concerning punishment
December 6, 1979	Jury Instructions: Granted: #1 thru #4 Refused: #1A, #4A, #4B
December 6, 1979	Jury Verdict (Punishment)
January 19, 1980	Doctor's Report on Exam.
January 19, 1980	Brown Envelope with report enclosures inside
January 28, 1980	Pre-Sentence Report
February 6, 1980	Order of Sentencing
February 6, 1980	Instructions Refused: #1A, #1B, #1C, #1D, #1E, #1F

Date	Name of Paper
February 20, 1980	Notice of Appeal
February 6, 1980	List of Commonwealth's Exhibit
	Defendant's Exhibits
	Newspaper Clippings
February 6, 1980	Printed Materials
	Deposition of Gussie Turner
January 15, 1980	Transcript of Trial 4 volumes
February 29, 1980	1 volume
September 3, 1981	Petition for Writ of Habeas Corpus
September 3, 1981	Motion for Stay
September 9, 1981	Order—Stay of Execution
September 9, 1981	Order—Attorney General to file a Responsive Pleading
September 16, 1981	Motion to Dismiss
January 19, 1982	Order—Appointing Attorneys
February 10, 1982	Order—Appointment of Counsel
February 10, 1982	Final Order
March 8, 1982	Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

CA 83-501-N

TURNER, WILLIE LLOYD, PLAINTIFFS

v.

BASS, GARY, Superintendent, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
July 28	1	Order granting motion to proceed in forma pauperis; filing petition; directing respondents answer within 30 days, entered and filed July 27, 1983. JAMacK, judge. Copies mailed as directed.
July 27	2	Petition for writ of habeas corpus.
July 27	3	Motion for leave to proceed in forma pauperis on behalf of the petition.
July 27	4	Affidavit in support of motion for leave to proceed in forma pauperis.
Aug. 25	5	Motion to dismiss on behalf of the respondents.
	6	Brief received.
Sep. 12	—	State Court records received.
Nov. 1	7	Response to motion to dismiss on behalf of the
	8	petitioner. Brief received.
Nov. 4	9	Order directing the respondent file response on or before December 1, 1983, entered and filed November 4, 1983. JAMacK, judge. Copies mailed as directed.

DATE	NR.	PROCEEDINGS
1983		
Dec. 1	10	Reply to brief in response to motion to dismiss on behalf of the respondents filed in Richmond Division.
1984		
Mar. 19	11	Motion for leave to amend petition (with amended petition) on behalf of petitioner, *lodged.*
Mar. 21	—	Supplemental motion to dismiss, w/brief, on behalf of respondents, *lodged.*
Mar. 26		Court Proceedsing; JAM, j. & JTT, U.S. Mag. Rep. R. Zahn. Present: J. Lloyd Snook, III for petitioner and Robert H. Anderson, III, Ass't Atty. Gen. and Jerry P. Slonaker, Asst. Atty. Gen. for respondent. Came on for hearing on respondent's motion to dismiss and petitioner's cross-motion for summary judgment Court directs filing of amended petition. Motions argued. Court takes matter under advisement. (Hearing being transcribed).
Mar. 26	11	Motion for leave to file amended petition on behalf of petitioner.
Mar. 26	12	First amended petition for writ of habeas corpus on behalf of petitioner filed by direction of Judge MacKenzie.
Mar. 26	13 14	Supplemental motion to dismiss on behalf of defendants. Brief in support of motion, received.
May 8	15	Response to petitioner's supplemental memorandum on behalf of respondent.

DATE	NR.	PROCEEDINGS
1984		
May 23	16	Memorandum order denying and dismissing petition; granting certificate of probable cause; and outlining procedure for noting an appeal; entered and filed May 23, 1984. JAMacK, judge. Copies mailed as directed.
May 23	17	Judgment dismissing action entered by the Clerk May 23, 1984, and filed o.b. Copies mailed.
June 5	18	Motion to alter or amend judgment on behalf of the petitioner.
July 2	19	Motion to alter or amend judgment on behalf of the petitioner. Supplemental memoran-
	20	dum received.
July 9	21	Response to motion to alter or amend judgment on behalf of the respondents filed in Richmond.
July 19	22	Order denying petitioner's motion to alter or amend judgment, entered and filed July 19, 1984. JAMacK, judge. o.b. Copies to counsel.
Aug. 16	23	Notice of appeal on behalf of the petitioner.
Aug. 16	24	Motion for leave to proceed on appeal in forma pauperis.
Aug. 16	25	Affidavit in supoprt of motion to proceed on appeal in forma pauperis on behalf of the petitioner.
Aug. 16	26	Motion for stay on behalf of the petitioner.
Aug. 20	—	Conformed copy of notice of appeal mailed by the Clerk to the Clerk, U.S. Court of Appeals (with a copy of the docket entries) and to Robert H. Anderson, III, Asst. Atty. Gen.
Aug. 21	27	Order denying motion to stay execution, entered and filed August 21, 1984. JAMacK, judge. o.b. Copies mailed as directed.

INDICTMENT

COMMONWEALTH OF VIRGINIA

COUNTY OF SOUTHAMPTON, to-wit:

IN THE CIRCUIT COURT OF SAID COUNTY:

April 16, 1979

The Grand Jurors of the Commonwealth of Virginia in and for the body of the County of Southampton, and now attending the Circuit Court for the said County, upon their oaths present: That on or about the 12th day of July, 1978, in the City of Franklin, Southampton County, Virginia, Willie Lloyd Turner did unlawfully, feloniously, wilfully, deliberately and with premeditation kill W. Jack Smith, Jr. while in the commission of a robbery while armed with a deadly weapon, Va. Code § 18.2-31(d), against the peace and dignity of the Commonwealth of Virginia.

THIS INDICTMENT found at the April Term, 1979, of the Circuit Court of Southampton County, on the evidence of Alan D. Bain witnesses sworn and sent to the Jury by the Court.

VIRGINIA:

IN THE CIRCUIT COURT
OF SOUTHAMPTON COUNTY

COMMONWEALTH OF VIRGINIA, PLAINTIFF

v.

WILLIE LLOYD TURNER, DEFENDANT

PROPOSED QUESTIONS ON VOIR DIRE ON BEHALF OF THE DEFENDANT

(1) Do you know anything about the facts of this case and the charges against Willie Lloyd Turner?

(2) Have you read, seen or heard any news articles of the facts of this case or the charges against the defendant?

(3) Have you heard anyone discuss this case in any way?

(4) Have you formed any opinions as to the guilt or innocence of the defendant, Willie Lloyd Turner?

(5) Have you formed any opinion as to what punishment Willie Lloyd Turner should receive if guilty?

(6) Are you related by blood or marriage to any person who is employed as a policeman or any other law enforcement officer?

(7) Have you or any members of your family been a victim of any crime of any sort? If so, what kind?

(8) (If the answer to the foregoing question is Yes, then ask the following:) Will the fact that you have been related to such a crime affect your ability to reach a fair and impartial verdict based on the evidence in this case?

(9) The defendant in this case, Willie Lloyd Turner, has been convicted of felonies on prior occasions and has previously served time in the penitentiary. Will those facts affect your judgment as to the guilt or innocence of the defendant or in determining the grade of the offense?

(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(12) Do you feel that every person convicted of the unlawful killing of another person should receive the death penalty?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?

/s/ William R. Savage, III
WILLIAM R. SAVAGE, III

VIRGINIA:

IN THE CIRCUIT COURT
OF NORTHAMPTON COUNTY

COMMONWEALTH OF VIRGINIA

v.

WILLIE LLOYD TURNER, DEFENDANT

REPORTER'S TRANSCRIPT OF RECORD

Before HON. JAMES C. GODWIN, Judge, and jury
Northampton County, Virginia,
December 3, 1979

APPEARANCES: Mr. Richard C. Grizzard,
Commonwealth's Attorney.

Mr. Thomas L. Woodward, Jr., and
Messrs. Glasscock, Gardy & Savage
(Mr. W. Richard Savage, III),
attorneys for the defendant.

* * * *

[7] MR. WOODWARD: Your Honor, on behalf of the defendant, we would also move to dismiss the indictment against him which alleges what is commonly known as capital murder, in that the death penalty itself is unconstitutional in its application and constitutes cruel and

unusual punishment, in violation of Amendments 8 and 14 to the Constitution of the United States; and, further, to the Constitution of the Commonwealth of Virginia.

* * * *

[9] We would further say to the Court that the death penalty or capital murder statute which applies the death penalty as ultimate punishment is [10] unconstitutional in that its application in various states which have adopted United States Supreme Court applied-type statutes that those who are of minority races such as the defendant in this case; those who may suffer from other disabilities by race such as Chicanos, for example, have been disproportionately sentenced to death because of their race; and, further, the race of the victim as studied at Northeastern University in Boston has been shown. We have those in greater detail and we would ask the Court to allow us to submit them subsequently.

I would indicate that in addition to the race of the defendant in a particular case, the race of the victim has a great deal to do with whether he receives the death penalty or not. Those studies which have been conducted in a number of states seem to indicate that in cases where the victim, as in this case, is white that a disproportionate number of defendants are sentenced to death; that where the victim is of a minority group, such as a black, then very seldom is the death penalty applied and, in its application, we state to you that the constitutionality of the death penalty is seriously questioned and we submit to you that in its [11] application it is unconstitutionally applied and is violative of the applicable section of the United States Constitution and the Constitution of the Commonwealth of Virginia. Our motion, therefore, is to dismiss the indictment charging capital murder against the defendant in this case.

MR. GRIZZARD: Your Honor, without going into a lengthy debate or argument as regards the motion, everything that Mr. Woodward has put before the Court has

been ruled on by the Supreme Court of the State of Virginia and has been turned down by that Court. The only thing he brings up new today is some report he indicates from Northwestern and other states indicating, I think his statement was, that the death penalty was inflicted on the basis of race. I think you're taking figures and taking them out of context and that is not evidence as such in this particular matter. It's not for this Court to consider. In Virginia, I think you would have to take it on the cases in Virginia. I have not looked at them to break down who is on Death Row in Virginia and whether the victims are white or black, but I think the statute in Virginia is pretty clear that it doesn't say whether it was a black man or white man who got killed or a black man [12] or white man who was the perpetrator of the crime. The statute states certain prerequisites that have to be met before the death penalty is imposed. That statute is constitutional and has been set so by the state.

MR. WOODWARD: The statement that I made regarding the disproportionate application of the death penalty is based on a study which, again, I would state that we would like to submit subsequently. We would like Mr. Grizzard to see it and it was prepared by Northeastern University, not Northwestern.

MR. GRIZZARD: Excuse me.

MR. WOODWARD: It was prepared there with the idea that the race of the victim indicates disproportionate application of the death penalty, not only in one state, but in a number of states where those studies have been conducted. I do not know of my own knowledge the race of the victims in Virginia who have had defendants sentenced to death. There are, I believe, seven cases since our death penalty statute was revised. My understanding is that all those victims are white and certainly since trials have been conducted since the Virginia statute has been amended, I cannot conceive of no [13] blacks being killed, so our contention is the application is disproportionate because of the race of the victim and, therefore, that

denies equal protection and due process to the defendant. That is the assertion of the Northeastern University study and it's our assertion before you. We would certainly be remiss, however, if we did not state to the Court but for that point, Mr. Grizzard . . . . (unintelligible)

The other points that we have raised have been either directly ruled upon by our Supreme Court or at least laterally spoken to by that Court. Certainly always favorable for the Commonwealth as he has indicated.

THE COURT: Well, gentlemen, of course, our Supreme Court has ruled on this question in practically every case gone up and they have clearly stated that the Virginia statute was constitutional and I so rule at this time and note your exception in the record.

MR. WOODWARD: Your Honor, may we preserve the right to submit that study?

THE COURT: You can submit any study you desire and I will file it as part of the record.

MR. GRIZZARD: Again, like Mr. Savage and [14] Mr. Woodward, before it's submitted in the presence of the jury, I think he should submit it to the Court for argument and discussion outside the presence of the jury.

MR. WOODWARD: We don't intend to submit it before the jury.

THE COURT: It won't be a matter taken up before the jury. We're talking about matters of law.

MR. WOODWARD: Question of law. That's for the Court to decide.

* * * *

[31] MR. GRIZZARD: If it please the Court, the list that's prepared, I assume it's the list with the fifteen questions—

MR. SAVAGE: Right.

MR. GRIZZARD: —that Mr. Savage and Mr. Woodward have been kind enough to provide us a copy of. The Commonwealth would object starting on the second page with the question Number 10. The general question on bias and what-have-you would, I think, satisfy the re-

quirements of Number 10. Number One, this is not a rational case. There are no rational overtones in the allegations of this case. It's a simple case of whether or not the defendant committed murder in the commission of a robbery. The fact that you have got people of different races—victim and perpetrator—is of no consequence and I don't think it is a proper question of inquiry for the jury.

Questions 14 and 15 deal with really instructions that would be pertinent in the second [32] stage of this bifurcated trial. The voir dire question itself is couched in such a way as to ask the juror on voir dire to make a determination as to what his ultimate disposition of the case might be at the end of the case without hearing any of the evidence, without knowing any of the facts and, I think, on that basis it's much too broad. It's improper and it should not be asked. The Commonwealth takes the same position as regards Question Number 15. It's an attempt at this stage to get a juror to commit himself to vote yea or nay on the ultimate issue without hearing any facts or knowing anything about the case.

Questions 11 and 12 and 13 again are asking the jurors to—in effect are attempting to put the jurors on the defensive. If they answer, for instance, in Number 13, "Do you feel that every person convicted of an unlawful killing should receive the death penalty?", if the juror is selected and says no to that question and when the times comes after the evidence has been presented as to mitigation or extenuating circumstances, that juror would be reminded in argument of his pledge on voir dire and then he would be told that if he said he wouldn't do it, he cannot do it. That's [33] the purpose of that type of question. It's to put the jurors on the defensive. It goes to the ultimate issue in the case and, again, the objection to 11, 12 and 13 is that they are improper. They are going to the ultimate issue and are not eliciting proper information on voir dire. The Commonwealth would object to everything from 10 to 15.

THE COURT: How about 9?

MR. SAVAGE: Judge, we withdraw 9 on defendant's motion.

THE COURT: That's what I was wondering.

MR. SAVAGE: No, sir. We proposed these questions several months ago and we want 9 removed.

THE COURT: Gentlemen, as far as 10 through 15 are concerned, Question 10 has been ruled on by the Supreme Court. I'm not going to ask that. Eleven, 13, 14 and 15, I think they are covered adequately and fully by instructions of the Court. I don't think the jury should consider those at this particular time. I will ask the question in the nature of Number 12 as I also do not want a person on the jury who feels that the death penalty should be given in every case of unlawful killing or homicide. Now, are there any other questions?

[34] MR. SAVAGE: Note our exception to the Court's ruling.

* * * *

[43] THE COURT: Ladies and gentlemen, the case that you will hear today is one of Commonwealth of Virginia versus Willie Lloyd Turner. Willie Lloyd Turner is charged with the use of a firearm in the commission of a felony. He's charged with possession of a sawed-off shotgun in the preparation of a robbery. He is charged with capital murder. He is charged with killing W. Jack Smith, Jr., while in the commission of a robbery while armed with a deadly weapon.

Now, these offenses are alleged to have occurred on the 12th day of July, 1978, in the City of Franklin, Virginia. Willie Lloyd Turner, the defendant, is represented in these cases by Mr. William R. Savage from Suffolk, Virginia; Mr. Thomas L. Woodward, Jr., from Suffolk, and the Commonwealth of Virginia is represented in this case by Mr. Richard C. Grizzard, Commonwealth's Attorney [44] for the County of Southampton.

Now, in the case of possession of a sawed-off shotgun in the perpetration of a robbery, it was the perpetration of a robbery of Alan D. Bain.

Now, is there any member of the jury related by blood or marriage to either of the attorneys involved in this case, to the defendant or to the alleged victims, either Alan D. Bain or W. Jack Smith, Jr.?

Now, is there any member of the jury who has any knowledge about the facts of this case?

Have you read or seen any articles in the newspaper or have you heard through any news media, radio, television, through any source, anything about these cases?

Have you heard anyone discuss this case in any way?

Now, are you related by blood or marriage to any person who is employed as a police officer or any other law enforcement agency?

Have you or any members of your family been a victim of any crime?

Now, ladies and gentlemen, one of the charges in this case, the alleged charge of murder of [45] W. Jack Smith, Jr., is a capital case and carries the possibility of the death penalty, if convicted.

Now, Mr. Kellam, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MR. KELLAM: (Shaking head negatively.)

THE COURT: Mrs. Mapp, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. MAPP: No, sir.

THE COURT: Mrs. Holland, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. HOLLAND: No, sir.

THE COURT: Mrs. Bailey, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. BAILEY: No.

THE COURT: Mrs. Merritt, do you have any religious or conscientious scruples or objections against the imposition of a sentence of death?

MRS. MERRITT: No.

THE COURT: Now, do any of you on this panel—do any of you feel that every person convicted of murder of another person should receive the [46] death penalty?

* * * *

[47] THE COURT: Bring them back just one second, Mr. Sheriff. I have got one more question that I want to ask them.

(The four jurors returned to the courtroom.)

THE COURT: Be seated, ladies.

I want to ask you ladies, do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases, either for the defendant or for the Commonwealth of Virginia? Do [48] any of you know why you cannot render an impartial verdict in this case?

THE JURORS: No.

THE COURT: Do any of you know any reason whatsoever why you should not sit as a member of the jury in this case?

THE JURORS: No.

* * * *

PROCEEDINGS IN THE CIRCUIT COURT OF NORTHAMPTON COUNTY

VIRGINIA:

IN THE CIRCUIT COURT
OF NORTHAMPTON COUNTY

The 6th day of December, 1979

86-79

COMMONWEALTH

vs.

WILLIE LLOYD TURNER

Court convened at 9:40 o'clock a.m.

After hearing the additional evidence, instructions of the Court and argument of counsel, the jurors were sent to the jury room to consider their sentence. They subsequently returned their sentence in open court in the following words:

> "We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the indictment, and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and/or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the

victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

/s/ J. E. Worsley
Foreman"

The Court, before fixing punishment or imposing sentence, doth direct the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, and sentencing is to be set on a date to be determined by the Court.

The Court orders that a transcript of this trial be made a part of the record and this case is continued.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorneys were likewise personally present and capably represented the defendant.

And the defendant is remanded to jail.

Enter the 6th day of December, 1979.

/s/ James C. Godwin
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF
SOUTHAMPTON COUNTY

WILLIE LLOYD TURNER, PETITIONER

v.

EDWARD C. MORRIS, RESPONDENT

STATEMENT OF FACTS

1. The purpose of the hearing was to afford counsel for each party the opportunity to present legal arguments as to whether respondent's motion to dismiss the habeas corpus petition should be granted in lieu of having a plenary hearing.

2. At the outset of the hearing, counsel for petitioner acknowledged that the only grounds that had not previously been raised either at trial or on direct appeal to the Supreme Court of Virgina and thus which were now reviewable were the matters contained in allegations (2), (3), (12) and (16) in the petition. Counsel then presented arguments concerning allegations (2), (12) and (16). No arguments regarding allegation (3) were presented by either party.

3. With respect to allegation (2), counsel for petitioner referred to a study which was under preparation and which was alleged to deal with the application of the death penalty in Virginia. Counsel stated that he hoped that the study would be ready in two to three weeks but was unable to represent to the Court when it might be available and also was not in the position to indicate what the ultimate findings were likely to be. Counsel additionally stated that trial counsel for petitioner had known nothing about such a pending study at the time of the trial.

4. With respect to allegation (12), counsel for petitioner presented various arguments in support of his claim that trial counsel had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at trial. In part, counsel proffered that defense counsel had not consulted any psychiatrists or psychiatric experts other than Dr. Bransfield in attempting to familiarize themselves with the psychiatric issues involved in the case. Counsel also offered to establish that the trial attorneys had not adequately researched comparable murder statutes in various other jurisdictions regarding the definition and application of the mitigating factors set forth in § 19.2-264.4B of the Code of Virginia (1950), as amended. Petitioner's attorney also challenged the failure of trial counsel to prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

5. In response to these arguments, counsel for respondent referred the court to the testimony of Dr. Robert Bransfield, a witness for petitioner. Dr. Bransfield was permitted on direct examination to testify that in his view petitioner was under the influence of mental disturbance while he was committing the crime. It was pointed out that this answer precisely tracked the language set forth in § 19.2-264.4B.

6. With respect to allegation (16), counsel for the opposing parties briefly presented arguments consistent with the contentions advanced in the petition for a writ of habeas corpus and Motion to Dismiss, respectively.

7. At the conclusion of the hearing, the Court indicated that it would take the case under advisement. By order of February 10, 1982, the court denied and dismissed the petition.

June 3, 1982

/s/ James C. Godwin
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, RESPONDENT

**FIRST AMENDED PETITION
FOR WRIT OF HABEAS CORPUS**

TO THE HONORABLE JUDGE OF THE SAID COURT:

Now comes your Petitioner, Willie Lloyd Turner, and represents unto this Honorable Court that he is illegally held, under sentence of death, in the custody, confinement and restraint of the Respondent, his agents and employees, at the Mecklenburg Correctional Center of the Virginia Department of Corrections, located in Boydton, in the County of Mecklenburg, Virginia, and that his confinement under sentence of death is illegal for the reasons set forth below.

* * * *

IX. *The trial court's failure to permit individual voir dire, to allow any questioning into the racial attitudes of jurors, to probe the jurors' understanding of the presumption of innocence, reasonable doubt, and burden of proof, and to fully question jurors about their views on the death penalty deprived Petitioner of his rights to a trial by a fair and impartial jury and to due process of law under the Sixth and Fourteenth Amendments to the United States Constitution.*

68. Counsel requested that *voir dire* be conducted of each venireman individually, so that biases could not be

communicated among veniremen impermissibly. This request was reiterated after venireman Cosby Kellam's response, as counsel was concerned that the other jurors were tainted by having heard Mr. Kellam's response. The request was denied.

69. Petitioner is a black man; his victim, Jack Smith, was white. Counsel asked the court to *voir dire* the panel to determine whether their racial attitudes would affect their deliberations. The court refused to question the panel on their racial attitudes, denying Petitioner his right to a jury free from racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182 (1981).

70. The trial court failed to *voir dire* the panel on their ability to comprehend and to follow the legal principles involved. Statistical evidence reveals that as many as 37% of the American people do not understand the presumption of innocence—they believe that the defendant in a criminal trial has a burden to acquit himself. *Voir dire* is necessary to determine whether these veniremen in fact shared these views.

71. The trial court asked only two simple, superficial questions concerning the attitude of the jurors toward the death penalty. None of the jurors was ever asked the proper question—whether their attitudes toward the death penalty were so firmly held that they would not be able to follow the instructions of the court.

72. Petitioner was denied his right to have a meaningful *voir dire*, sufficient to assure that Petitioner would not be tried by a jury that was biased against him because of his race, or by a jury that did not understand and could not follow the presumption of innocence, or by a jury that could not follow the instructions of the trial court. The trial court's handling of *voir dire* violated Petitioner's rights to a fair and impartial jury and to the due process of law, rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, Superintendent, RESPONDENT

BRIEF IN RESPONSE TO MOTION TO DISMISS

Petitioner has alleged sixteen separate counts of unconstitutional detention. Rather than proceed *seriatim* through each of the sixteen arguments, Petitioner will discuss all of the unconstitutionality issues together, all of the jury issues together, and so on, to avoid repetitious argument.

STATUTORY UNCONSTITUTIONALITY

Petitioner has raised seven counts (I, II, III, IV, XIV, XV, and XVI) in which he attacks the constitutionality, either facially or as applied, of the Virginia death penalty statutes.

In Count XIV, he alleges that execution by electrocution is cruel and unusual punishment. That issue will be dealt with at the end of this brief. Of the remaining issues, Respondent has argued that five of them (I, III, IV, XV and XVI) are controlled by prior decisions of the United States Supreme * * *

* * * *

	Estimated Number of Offenders	Persons Sentenced to Death	Probability of a Death Sentence
Black kills White	443	100	22.57%
White kills White	857	123	14.35%
Total—White Victim	1,300	223	17.15%
Black kills Black	441	17	3.85%
White kills Black	50	2	4.00%
Total—Black Victim	491	19	3.87%
Total—All Victims	1,791	242	13.47%

From this very rough data, two trends may be noted. First, there appears to be a very strong likelihood that the race of the offender and the race of the victim (and, in particular, the way in which those two variables interact) will have a very large effect upon whether a particular defendant receives the death sentence. This is true across the country, as the survey from Georgia, Florida, Texas, Alabama and Ohio shows. The Virginia Supreme Court dismissed this data out of hand, as not having been related to Virginia.

With the data that we do have, we can see, in rough outline, that there is certainly a disparate impact upon blacks, and, particular, upon blacks who kill whites. Petitioner will be the first to concede that the data that he has thus far accumulated on Virginia is not subject to rigorous statistical analysis. But the data does raise a showing of disparate impact that is strong enough that this court should allow further inquiry.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, PETITIONER

v.

GARY BASS, RESPONDENT

MOTION TO ALTER OR AMEND JUDGMENT

* * * *

The second issue on which this Motion is based is the refusal of this Court to permit an evidentiary hearing.

* * *

In the attached Supplemental Memorandum, incorporated herein by reference, Petitioner has spelled out 10 different topics on which an evidentiary hearing is necessary. An eleventh was omitted, though it is arguably included in other paragraphs—that the tendency to apply disproportionately the death penalty to blacks who are charged with killing whites is, if not cause for striking down the statute, at least sufficient evidence of discrimination to make it mandatory for a trial judge to voir dire the jury concerning racial prejudice in a case where a black man is faced with the death penalty for killing a white.

In support of these claims, Petitioner introduced at trial a study by Bowers and Pierce; in recent years other studies have been done, on which Petitioner would rely, if given the opportunity. *See, e.g.*, Paternoster, "Race of Victim and Location of Crime: The Decision to Seek

the Death Penalty in South Carolina", 74 J. Crim. L. & Criminology 754 (1983); Gross and Mauro, "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization", (Prepublication Draft, October, 1983).

If afforded an opportunity in an evidentiary hearing, Petitioner would expect to put on evidence from social scientists such as Professor Paternoster (Assistant Professor at the University of Maryland). Professor Paternoster is familiar with and able to present the studies of Professors Gross and Mauro, as well as the research that has been done by Professors Bowers and Pierce at Northeastern University, whose early work was manifested in the report that was introduced at trial. Bowers and Pierce did much of the seminal work in statistical evaluation of discrimination—in employment and education contexts as well as in capital sentencing law. Their research on the discriminatory impact of the death penalty has been the basis for most of the post-*Furman* research in the area. Bowers & Pierce "Arbitrariness and Discrimination under Post-*Furman* Capital Statutes", 26 Crime & Delinq. 563 (1980). *See also* Bowers, "The Pervasiveness of Arbitrariness and Discrimination under Post-*Furman* Capital Statutes", 74 J. Crim. L. & Criminology 1067 (1983).

For the purposes of an offer of proof in support of this Motion, Petitioner submits herewith a copy of the Gross and Mauro study, "Patterns of Death," as Petitioner's Exhibit One. That study was done in eight states; Georgia, Florida and Illinois are discussed at length in the body of the article (that portion of the article has not been submitted to this Court, because of its marginal relevance; that is why pages 42 through 90 are missing), while the results from Arkansas, Mississippi, North Carolina, Oklahoma and Virginia are described briefly in the text and presented in summary form in an appendix. The results from those five states, including Virginia, are summarized beginning at page 91.

Gross and Mauro caution that the statistics from Virginia, if viewed in isolation, may be suspect because the number of death sentences reviewed—19—was simply too small.

> Considered in isolation, such small numbers make any sentencing pattern hard to discern: only very strong effects can be seen clearly with so few observations. Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states separately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing—indeed, that it is more likely than not—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.
>
> Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities.

Pre-publication draft at 91-92. The study concluded that

> In Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.

Id. at 96. Because of the small sample size, this number, taken by itself and out of the context provided by the other states, is not statistically significant proof that the race of the victim has an effect on the probability of receiving the death penalty. *Id.* at 94. However,

> When we examined the effect of the race of the victim in models that included the race of the suspect as a variable the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically nonsignificant; in the remaining four states—Oklahoma, Mississippi, Virginia, and Arkansas—the effect became larger.

Id. at 96-97.

This evidence is precisely the point of our claim—even if the data is not sufficient at this point to prove that the death penalty is being discriminatorily applied in Virginia, a contention that can only be sustained if the data from the rest of the country is ignored, it is certainly sufficient to raise a strong question about the possible impact of racial bias in the decision of a jury to impose the death sentence. Even if the data is therefore insufficient to strike down the death penalty statutes, it is clearly sufficient to support counsel's timely request for voir dire on racial prejudice in a case in which a black man is accused of killing a white man.

We ask this Court to do either or both of the following:

1. Allow an evidentiary hearing on the question of whether racial prejudice affects the decision to impose death;

2. Consider the evidence in the proffered Gross and Mauro study, together with the other work that has been done in the field of discrimination, and reconsider this Court's decision not to grant the Petition for Writ of Habeas Corpus.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-4004

WILLIE LLOYD TURNER, APPELLANT

vs.

GARY BASS, APPELLEE

APPELLANT'S OPENING BRIEF

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* * * *

Of course, Bowers & Pierce did not study Virginia death sentences. However, Gross & Mauro did study the Virginia death sentences in nineteen cases, as compared to 1,389 criminal homicides. The results, put in rough statistical terms, shows that one who kills a white victim is four times more likely to receive the death sentence than one who kills a black victim (2.3% to 0.5%). If a black kills a white, he has an 8.2% chance of receiving the death penalty; if a white kills a white, he has a 1.3% chance of receiving the death penalty; if a black kills a black, he has a 0.6% chance of receiving a death penalty; and no white has received the death penalty for killing a black since Virginia's new statute was enacted in 1977.

There are currently twenty-seven on Virginia's death row; two have died while on death row (one by execution). Of those twenty-nine men, sixteen are black, one is Asian, one was Mexican and eleven are white.

The statistics just mentioned, though perhaps supportive of a claim of race discrimination in other states is admittedly not conclusive in Virginia to justify the drastic step of declaring the system to be unconstiutional.[2] * * *

* * * *

> Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting

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[2] This Court recently rejected such a claim in *Shaw v. Martin*, 733 F.2d 304 (4th Cir. 1984). The claim in *Shaw* was based on proffered data from Professor Raymond Paternoster. As this Court noted, *id.* at 312, Dr. Paternoster's data was "hardly significant" to show discrimination—the difference was between 6.2% and 4.2%, as opposed to 2.3% and 0.5% in Virginia.

Another flaw in Dr. Paternoster's research was that "it did not adequatley compare murders of similar atrocity." *Id.* Gross and Mauro did control for that variable; the small sample size was one reason that they cautioned against "considering these states in isolation." App. 420. The new data for crimes of comparable atrocity is consistent with, but cannot itself prove, discriminatory impact. See Table 12, App. 433.

> the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with [racial prejudice] amount to an unconstitutional abuse of discretion.

451 U.S. at 190.

The question, therefore, is whether there is any "special circumstance" that makes it likely that racial prejudice will be an issue in this case.

There is nothing relating to the facts of this particular case that suggest racial antagonism. However, this is a capital murder case. As discussed above, capital murder cases often involve racial prejudice, even when obvious issue of racial import is present in the case. This is unavoidable.

It is well known that jurors perceive blacks and whites differently. In their classic study, Kalven & Zeisel noted that jurors tend to be less sympathetic to black defendants than to white defendants; less sympathetic jurors are more likely to convict, and are more likely to impose the death sentence. H. Kalven and H. Zeisel, *The American Jury*, 210 (1966). Capital murder trials necessarily involve asking the jurors to act as the conscience of the community. They are not only applying facts to clear, precise issues of law; they are also, to a certain extent, defining the law. They are taking the very rough standards provided by the instructions, and are fashioning those standards into a community standard—the conscience of the community. * * *

* * * *

PRE-PUBLICATION DRAFT

PLEASE DO NOT QUOTE OR CITE
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PATTERNS OF DEATH:

AN ANALYSIS OF RACIAL DISPARITIES

IN CAPITAL SENTENCING AND

HOMICIDE VICTIMIZATION

Samuel R. Gross
Standford University
School of Law

Robert Mauro
Standford University
Department of Psychology

October 1983

* * * *

V. *Racial Patterns in Capital Sentencing in Oklahoma, North Carolina, Mississippi, Virginia and Arkansas*

So far we only discussed Georgia, Florida and Illinois. Our findings in the other five states in this study—Oklahoma, North Carolina, Mississippi, Virginia and Arkansas—are summarized in an appendix.[179] In this section we will merely touch on the major racial pattern that we found in each of these states: disproportionate capital sentencing for white-victim homicides.

A word of caution is in order. As we go down the list of states from Oklahoma to Arkansas our data become increasingly attenuated. Our study includes 43 death sentences in Oklahoma, 27 in North Carolina,[180] 22 in Mississippi, 19 in Virginia and 15 in Arkansas. Considered in isolation, such small numbers make any sentencing patterns hard to discern: only very strong effects can be seen clearly with so few observations.[181] Some of the racial disparities that we report would not, on their own, constitute convincing proof of racial discrimination; this is particularly true for Arkansas and Virginia, in each of which we studied fewer than twenty death sentences. If we were examining the data from one of the states sepa-

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[179] *See infra* Appendix 2.

[180] Two of these cases involved Indian victims and defendants, and one involved an Indian defendant and a black victim. *See supra* note 103 and accompanying text.

[181] The problem of small numbers is considerably less pronounced in Oklahoma, where we had only two fewer death sentences than in Illinois, than it is in the remaining four states. But in Oklahoma there is an additional problem: because of the relatively small proportion of black-victim homicides—less than a third of the total—the expected numbers of black-victim death sentences in some categories (i.e., the numbers that would be found in the absence of racial disparities) are quite small. This statistical fact makes it more difficult to detect disparities that further reduce the numbers of black-victim death sentences.

rately from the rest we would conclude that there is good reason to suspect racial discrimination in capital sentencing—indeed, that it is more likely than not—but that it is too early to tell for sure. But we are not considering these states in isolation, and we are not primarily interested in determining the existence of racial discrimination in any particular state.

Viewed collectively, the data from these five states show a remarkably consistent pattern of racial disparities. Table 30 illustrates this pattern: considering felony and non-felony homicides separately, black-victim homicides in each state were substantialy less likely to receive death sentences than white-victim homicides.

Table 30

Percentage of Death Sentences by Felony Circumstances and Race of Victim

	Felony		Non-Felony	
	Oklahoma			
White Victim	30.6%	(22/72)	3.7%	(18/482)
Black Victim	0%	(0/17)	1.4%	(3/221)
	North Carolina			
White Victim	13.6%	(14/103)	1.0%	(7/678)
Black Victim	4.3%	(2/46)	0.2%	(2/869)
	Mississippi			
White Victim	32.5%	(13/40)	2.6%	(4/151)
Black Victim	9.5%	(4/42)	0.2%	(1/564)
	Virginia			
White Victim	14.3%	(13/91)	0.4%	(2/497)
Black Victim	6.9%	(4/58)	0%	(0/649)
	Arkansas			
White Victim	9.2%	(8/87)	1.5%	(5/332)
Black Victim	4.5%	(2/44)	0%	(0/406)

In Table 31 white-victim and black-victim homicides in each of these states are tabulated by level of aggravation. Again, as in Georgia, Florida and Illinois,[182] we see disproportionate capital sentencing for white-victim cases in each state at each level of aggravation.

Table 31

Percentage of Death Sentences
By Level of Aggravation and Race of Victim

	Number of Major Aggravating Circumstances		
	0	1	2-3
	Oklahoma		
White Victim	1.5% (6/389)	12.8% (15/117)	38.8% (19/49)
Black Victim	0.5% (1/210)	6.3% (2/32)	0% (0/8)
p	.231	.243	.030
			Overall p = .***
	North Carolina		
White Victim	0.9% (5/588)	1.7% (3/176)	17.6% (13/74)
Black Victim	0.1% (1/803)	0% (0/133)	8.0% (2/25)
p.	.052	.183	.207
			Overall p = .***
	Mississippi		
White Victim	1.5% (2/134)	15.9% (7/44)	27.6% (8/29)
Black Victim	0.% (0/525)	1.1% (1/95)	21.1% (4/19)
p	.041	.001	.437
			Overall p = .***
	Virginia		
White Victim	0% (0/454)	4.5% (5/112)	13.1% (10/76)
Black Victim	0% (0/615)	2.0% (2/99)	7.1% (2/28)
p	—	.227	.319
			Overall p = .***
	Arkansas		
White Victim	0% (0/265)	8.9% (8/90)	12.1% (5/41)
Black Victim	0% (0/338)	2.2% (1/45)	6.7% (1/15)
p	—	.134	.485
			Overall p = :***

[182] *See supra* Table 23.

We also constructed logistic regression models for these five states following the procedures described earlier.[183] The race-of-victim coefficients for the "best fitting" models for each of these states are reported in Table 32. As Table 32 shows, the race of the victim had sizeable effects on the likelihood that a defendant would receive the death penalty in Oklahoma, North Carolina, and Mississippi and these effects were statistically significant beyond the conventional .05 level. In Virginia and Arkansas the race of the victim had less pronounced and statistically nonsignificant effects.

In Mississippi the overall odds that an offender would receive the death penalty for killing a white victim were 5.47 times greater than the odds that an offender would receive the death penalty for killing a black victim.[184] In North Carolina the overall odds that an offender would receive the death penalty for killing a white were 4.35 times greater than for killing a black.[185] In Oklahoma the odds of receiving the death penalty for killing a white were 4.31 times greater than the odds of receiving the death penalty for killing a black.[186] In Arkansas the odds of receiving the death penalty for killing a white were 3.56 times greater than the odds of receiving the death penalty for killing a black,[187] and in Virginia the odds of receiving the death penalty for killing a white were 2.41 times greater than the odds of receiving the death penalty for killing a black.[188]

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[183] [Footnote illegible].

[184] Change in $X^2(1) = 9.49$, $p = .002$, $B = 1.70$, s.e. $= .580$, model $X^2(31) = 30.258$, n.s.

[185] Change in $X^2(1) = 5.767$, $p = .016$, $B = 1.47$, s.e. $= .683$, model $X^2(30) = 23.399$, n.s.

[186] Change in $X^2(1) = 6.468$, $p = .011$, $B = 1.46$, s.e. $= .660$, model $X^2(25) = 22.001$, n.s.

[187] Change in $X^2(1) = 2.84$, $p = .092$, $B = 1.27$, s.e. $= .838$, model $X^2(32) = .97$, n.s.

[188] Change in $X^2(1) = 2.136$, $p < .20$, $B = .88$, s.e. $= .636$, model $X^2(38) = .94$, n.s.

When we examined the effect of the race of the victim in models that included the race of the suspect as a variable [189] the general picture remained essentially unchanged. In North Carolina the race-of-victim effect became smaller and statistically non-significant; in the remaining four states—Oklahoma, Mississippi, Virginia, and Arkansas—the effect became larger.[190] (In Arkansas a previously non-significant effect became statistically significant when we controlled for the race of suspect.)[191]

[Table 33 goes here]

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[189] See *supra* text accompanying note 135.

[190] North Carolina: change in $X^2(1)$ due to victim's race=1.96, n.s., B=1.77, s.e.=.811, model $X^2(51)=32.312$, n.s.; Oklahoma: change in $X^2(1)$ due to victim's race=5.29, p=.021, model $X^2(46)=43.936$, n.s.; Mississippi: change in $X^2(1)$ due to victim's race=9.88, p=.002, B=1.94, s.e.=.644, model $X^2(50)=56.031$, n.s.; Virginia: change in $X^2(1)$ due to victim's race=2.41, n.s., model $X^2(60)=43.509$, n.s.; Arkansas: change in $X^2(1)$ due to victim's race=8.00, p=.005, B=2.49, s.e.=1.02, model $X^2(51)=35.897$, n.s.

[191] The race of suspect coefficient itself was statistically significant in Arkansas (B=1.79, s.e.=.719) but not elsewhere. We also controlled for the race of the suspect by looking separately at the subsets of cases with black suspects. (*See supra* notes 136-39 and accompanying text); we found significant race-of-victim effects within these subsets in Oklahoma, Mississippi, Virginia, and Arkansas, but not in North Carolina. When we examined white-victim cases separately, we found significant race-of-suspect effects among these cases in Mississippi and Arkansas but not in the other three states. (Mississippi: change in $X^2(1)$ due to suspect's race=6.53, p=.011, B=1.83, s.e.=.735, model $X^2(27)=34.832$, n.s. Arkansas: change in $X^2(1)$ due to suspect's race=8.70, p=.003, B=2.34, s.e.=.875, model $X^2(28)=24.026$, n.s.).

Table 33 presents the same type of analysis that we presented in Table 25 for Georgia, Florida, and Illinois. It displays the predicted probabilities of a death sentence that are generated by the "best fitting" regression models for these five states, comparing hypothetical high aggravation and low aggravation cases with black victims to otherwise identical cases with white victims. In each state the predicted probability of a death sentence was much higher for homicides with white victims than for homicides with black victims, among high-aggravation and low-aggravation cases alike.[192]

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[192] The location of the homicide (urban or rural) did not have a statistically significant effect on capital sentencing in any of these states. Furthermore, controlling for geographic location in addition to the other variables included in the reported models did not substantially alter the effect of the race of the victim on capital sentencing in any of these states.

APPENDIX 2

Racial Patterns in Capital Sentencing: Oklahoma, North Carolina, Mississippi, Virginia and Arkansas

1. VIRGINIA

Percentage of Death Sentences
By Race of Victim

White Victim	2.3%	(15/646)
Black Victim	0.5%	(4/742)
All Cases	1.4%	(19/1389)

2. VIRGINIA

Percentage of Death Sentences
By Race of Victim and Suspect

Black Kills White	8.2%	(8/98)
White Kills White	1.3%	(7/544)
Black Kills Black	0.6%	(4/703)
White Kills Black	0%	(0/39)

3. VIRCINIA

Percentages of Death Sentences
By Race of Victim
And Felony Circumstance

	Felony		Non-felony	
White Victim	14.3%	(13/91)	0.4%	(2/497)
Black Victim	6.9%	(4/58)	0%	(0/649)

4. VIRGINIA

Percentages of Death Sentences,
By Race of Victim and Suspect,
And Felony Circumstance

	Felony		Non-felony	
Black Kills White	17.4%	(8/46)	0%	(0/35)
White Kills White	11.1%	(5/45)	0.4%	(2/458)
Black Kills Black	7.0%	(4/57)	0%	(0/611)
White Kills Black	0%	(0/1)	0%	(0/38)

5. VIRGINIA

Percentages of Death Sentences by Race of Victim and Relationship of Victim to Suspect

	Stranger Homicides		Non-stranger Homicides	
White Victim	7.6%	(10/132)	1.0%	(5/196)
Black Victim	1.3%	(1/75)	0.4%	(3/657)

6. VIRGINIA

Percentages of Death Sentences By Race of Victim and Suspect, And Their Relationship

	Stranger Homicides		Non-stranger Homicides	
Black Kills White	10.3%	(6/58)	6.3%	(2/32)
White Kills White	5.4%	(4/74)	0.7%	(3/460)
Black Kills Black	1.8%	(1/57)	0.5%	(3/636)
White Kills Black	0%	(0/18)	0%	(0/21)

7. VIRGINIA

Percentages of Death Sentences By Race of Victim and Number of Victims

	Multiple Victims		Single Victim	
White Victim	9.7%	(3/31)	2.0%	(12/615)
Black Victim	7.1%	(1/14)	0.4%	(3/728)

8. VIRGINIA

Percentages of Death Sentences By Race of Victim and Suspect, And Number of Victims

	Multiple Victims		Single Victim	
Black Kills White	20.0%	(2/10)	6.8%	(6/88)
White Kills White	5.0%	(1/20)	1.1%	(6/524)
Black Kills Black	7.1%	(1/14)	0.4%	(3/689)
White Kills Black	———		0%	(0/39)

9. VIRGINIA

Percentage of Death Sentences By Race and Sex of Victim

	Female Victim		Male Victim	
White Victim	4.6%	(9/195)	1.3%	(6/451)
Black Victim	1.7%	(3/178)	0.2%	(1/564)

10. VIRGINIA

Percentage of Death Sentences By Race of Victim And Means of Killing

	Guns		Other means	
White Victim	1.5%	(7/463)	5.0%	(8/159)
Black Victim	0.4%	(2/507)	0.9%	(2/224)

11. VIRGINIA

Percentage of Death Sentences by Race of Victim And Location of Homicide

	Rural		Urban	
White Victim	2.1%	(6/287)	2.5%	(9/359)
Black Victim	0.4%	(1/236)	0.6%	(3/506)

12. VIRGINIA

Ratio of Death Sentences by Race of Suspect and Victim And Number of Reported Aggravating Circumstances

	Number of Aggravating Circumstances				
	0	1	2	3	Totals
Black Kills White	0% (0/29)	4.5% (1/22)	14.6% (6/41)	16.7% (1/6)	8.2% (8/98)
White Kills White	0% (0/425)	4.4% (4/90)	10.7% (3/28)	0% (0/1)	1.3% (7/544)
Black Kills Black	0% (0/594)	2.4% (2/82)	8.0% (2/25)	0% (0/2)	0.6% (4/703)
White Kills Black	0% (0/21)	0% (0/17)	0% (0/1)	——	0% (0/39)

44

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PRELIMINARY TABULATIONS REFLECTING ARBITRARINESS AND DISCRIMINATION UNDER POST-*FURMAN* CAPITAL STATUTES

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and

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August 1979

Tables Listed in Groups

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM

Table 1—GEO
Table 1—FLA
Table 1—TEX
Table 1—ALA
Table 1—OHIO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM

Table 2—GEO
Table 2—FLA
Table 2—TEX

PROBABILITY OF A DEATH SENTENCE BY RACE AND SEX OF VICTIM

Table 3.1—GEO
Table 3.2—GEO

PROBABILITY OF A DEATH SENTENCE BY RACE AND SEX OF VICTIM

Table 4.1—GEO
Table 4.2—GEO

PROBABILITY OF A DEATH SENTENCE BY JUDICIAL CIRCUITS GROUPED REGIONALLY

Table 5.1—GEO
Table 5.1—FLA
Table 5.2—FLA

PROBABILITY OF A DEATH SENTENCE BY JUDICIAL CIRCUITS GROUPED REGIONALLY AND RACE OF VICTIM

Table 6.1—GEO
Table 6.1—FLA
Table 6.2—FLA

ADJUSTMENT PROCEDURES FOR TEMPORAL AND CROSS-SECTIONAL UNDERCOVERAGE OF HOMICIDE OFFENDER DATA

Appendix A

DATA SOURCES

Appendix B

Table 1—GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	14	.005
Offender/Victim Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	2265	72	.032
Black	2606	61	.023
Race of Victim			
White	2439	122	.050
Black	2432	11	.005
Offender/Victim Racial Combinations			
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0	.000
All Offenders	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	3771	38	.010
Black	2940	29	.010
Race of Victim			
White	3964	71	.018
Black	2740	2	.001
Offender/Victim Racial Combinations			
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
All Offenders	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 1—ALA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN ALABAMA FROM THE EFFECTIE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	462	35	.076
Black	933	6	.006
Race of Victim			
White	419	19	.045
Black	976	22	.023
Offender/Victim Racial Combinations			
Black Kills White	70	16	.229
White Kills White	392	19	.049
Black Kills Black	906	6	.007
White Kills Black	27	0	.000
All Offenders	1395	41	.030

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data for 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Vital Statistics tabulations on willful homicide for April 1976 through 1978, Division of Vital Statistics, State Department of Public Health, Montgomery, Alabama; (3) persons sentenced to death, supplied by the Southern Poverty Law Center, Montgomery, Alabama.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976 (source: 1) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.099 equals the number of homicide victims from April 1976 through December 1978 (source: 2) divided by the number of homicide victims in the years 1976 (source: 1). See Appendix A for a further discussion of the adjustment procedure.

Table 4.2—GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Age and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
0-20 years			
White	51	16	.313
Black	36	5	.149
21-30 years			
White	83	13	.157
Black	47	3	.021
31-50 years			
White	113	9	.080
Black	65	1	.015
Over 50 years			
White	146	26	.178
Black	47	2	.043

Data Sources: (101 Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 1—OHIO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN OHIO FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	850	45	.053
Black	1343	57	.042
Race of Victim			
White	976	82	.084
Black	1217	20	.016
Offender/Victim Racial Combinations			
Black Kills White	173	37	.214
White Kills White	803	45	.056
Black Kills Black	1170	20	.017
White Kills Black	47	0	.000
All Offenders	2193	102	.047

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1975 to December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Ohio Bureau of Criminal Identification, Columbus, Ohio; (3) Vital Statistics tabulations on willful homicides, supplied by Division of Physical Health, Atlanta, Georgia; (4) persons sentenced to death, supplied by the Adult Parole Authority, Columbus, Ohio.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 1.871 equals the number of homicide victims from January 1975 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2—GEO

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	196	37	.189
Black	338	42	.124
Race of Victim			
White	316	69	.218
Black	218	10	.046
Offender/Victim Racial Combinations			
Black Kills White	134	34	.254
White Kills White	183	35	.191
Black Kills Black	205	8	.039
White Kills Black	13	2	.154
All Offenders	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statisitcs tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Dealth Penalty, Atlanta, Georgia.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977, (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 2—FLA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	307	54	.176
Black	251	50	.199
Race of Victim			
White	432	97	.224
Black	122	7	.057
Offender/Victim Racial Combinations			
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
All Offenders	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 4.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND AGE OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Age and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
0-20 years			
White	179	19	.106
Black	341	6	.018
21-30 years			
White	404	13	.032
Black	844	4	.005
31-50 years			
White	620	11	.018
Black	994	2	.002
Over 50 years			
White	405	30	.074
Black	408	4	.010

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 3.2—GEO

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Sex and Race of Victim	Number of Felony Homicide Victims	Number of Death Sentences	Probability of a Death Sentence
Male			
White	323	44	.136
Black	171	7	.041
Female			
White	74	20	.270
Black	29	4	.138

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 2—TEX

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	Estimated Number of Offenders [a]	Persons Sentenced to Death	Probability of a Death Sentence
White	411	34	.083
Black	294	27	.092
Race of Victim			
White	551	62	.114
Black	151	2	.013
Offender/Victim Racial Combinations			
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
All Offenders	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2). See Appendix A for a further discussion of the adjustment procedure.

Table 3.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE AND SEX OF VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* CAPITAL STATUTE THROUGH 1977

Sex and Race of Victim	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Male			
White	1230	46	.037
Black	2010	9	.004
Female			
White	379	27	.071
Black	576	7	.012

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

Table 5.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Georgia Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
North	289	2	.007
Central	1011	41	.041
Atlanta	1133	7	.006
Southwest	985	21	.021
Southeast	837	19	.023
All Regions	4255	90	.021

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgee, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Southern, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconee, Atlantic, Eastern, Waycross, Brunswick).

Table 5.1—FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle	415	19	.046
North	980	31	.032
Central	1524	51	.033
South	1916	34	.018
All Regions	4835	135	.028

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 5.2—FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTES THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle	31	18	.581
North	141	20	.142
Central	172	39	.227
South	269	29	.108
All Regions	613	106	.173

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 6.1—GEO

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM AND JUDICAL CIRCUITS GROUPED REGIONALLY IN GEORGIA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Georgia Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
North			
White	227	2	.009
Black	72	0	.000
Central			
White	482	33	.068
Black	529	8	.015
Atlanta			
White	300	5	.017
Black	833	2	.002
Southwest			
White	336	19	.057
Black	649	2	.003
Southeast			
White	292	17	.058
Black	546	2	.004

Data Sources: (1) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (2) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a] Regional Groupings include the following Circuits: North (Lookout Mountain, Conasauga, Blue Ridge, Mountain, Northeastern, Rome, Cherokee); Central (Tallapoosa, Cobb, Coweta, Griffin, Clayton, Stone Mountain, Gwinnett, Alcovy, Piedmont, Western, Ocmulgec, Northern, Toombs, Flint); Atlanta (Atlanta); Southwest (Chattahoochee, Macon, Houston, Southwestern, Pataula, Cordege, Tifton, Dougherty, South Georgia, Souther, Alapaha); Southeast (Augusta, Middle, Dublin, Ogeechee, Oconce, Atlantic, Eastern, Waycross, Brunswick).

Table 6.1—FLA

PROBABILITY OF A DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF VICTIM AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle			
White	189	18	.095
Black	226	1	.004
North			
White	445	27	.061
Black	532	3	.006
Central			
White	842	48	.057
Black	677	3	.004
South			
White	972	29	.030
Black	936	4	.004

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Table 6.2—FLA

PROBABILITY OF A DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF VICTIM AND JUDICIAL CIRCUITS GROUPED REGIONALLY IN FLORIDA FROM THE EFFECTIVE DATE OF ITS POST-*FURMAN* STATUTE THROUGH 1977

Regional Grouping of Florida Judicial Circuits [a]	Number of Victims	Number of Death Sentences	Probability of a Death Sentence
Panhandle			
White	24	17	.708
Black	7	1	.143
North			
White	102	18	.176
Black	38	1	.026
Central			
White	138	37	.268
Black	34	2	.059
South			
White	191	25	.131
Black	76	3	.039

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a] Regional Groupings include the following Circuits: Panhandle (1, 2, 3 and 14); North (4, 5, 7 and 8); Central (6, 9, 10, 12, 13, 18, and 19); South (11, 15, 16 and 17).

Appendix A

ADJUSTMENT PROCEDURES FOR TEMPORAL AND CROSS-SECTIONAL UNDERCOVERAGE OF HOMICIDE OFFENDER DATA

For 1976 the Supplementary Homicide Reports compiled by local police agencies and filed with the Uniform Crime Reporting Section of the FBI were revised to include information on offenders as well as victims of criminal homicide in those cases where offenders or suspected offenders were arrested or known to the police. Since 1976, offender characteristics have been reported for roughly 85 percent of all homicide incidents or victims.

In most states, these Supplementary Homicide Reports are not compiled or filed with the FBI by all local jurisdictions, thus producing cross-sectional undercoverage of homicides.

Since these reports may not be filed by all local jurisdictions within a given state (cross-sectional undercoverage) and since the information on offenders is not reported prior to 1976 (temporal undercoverage) for all states, this data source will underestimate the number of homicide offenders since the effective date of post-*Furman* capital statutes in most states. To obtain adequate estimates of the numbers of homicide offenders arrested or known to the police during the effective periods of post-*Furman* capital statutes in the states under analysis, we must adjust for temporal and cross-sectional undercoverage.

Our adjustment for undercoverage of homicide offenders is based on full coverage homicide victim statistics. The Vital Statistics Program of the National Center for Health Statistics provides a virtually complete accounting of the victims of willful homicide in all states. Willful homicides as classified or defined by the Vital Statistics Program correspond quite closely to the UCR definition

or classification of criminal homicides. (Where coverage is complete for both data sources, the reported number of victims of homicide or homicide victims is very nearly the same, 95% on the average.)

Our victim-based adjustment factor is then the number of homicide victims in a state for the period to be studied divided by the number of homicide victims in that state for the period over which offender characteristics are available. Where the number of victims for the period of analysis is drawn from the Vital Statistics records or reports and the number of victims during the period for which offender data are available come the Supplementary Homicide Reports. The adjustment employed corrects for both temporal and cross-sectional undercoverage when the effective date of the post-*Furman* statute was earlier than 1976 and not all police agencies in the state consistently filed Supplementary Homicide Reports. Where a state has a post-1976 capital statute (as in Alabama) the adjustment is strictly for cross-sectional undercoverage; and where all police agencies in a state file Supplementary Homicide Reports (as in Florida) the adjustment is strictly for temporal undercoverage. In the latter case, homicide victim figures from the Supplementary Homicide Reports provide full coverage of homicide victims and are used in place of Vital Statistics figures to correct for temporal undercoverage.

It should be noted that this adjustment procedure assumes comparable arrest or suspect rates and offender/victim ratios for the time periods and geographical areas where offender data are missing or not available.

Appendix B

DATA SOURCES

Homicide data from crime reporting agencies

Homicide data for all states, 1973-1976: computerized Supplementary Homicide Reports, supplied by Paul Zolbe, Chief, Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.

Homicide data for Alabama 1977-1978: xeroxed copies of individual Supplementary Homicide Report forms supplied by Michael Devine, Chief, Uniform Crime Reporting Program, Criminal Justice Information Center, State of Alabama, 858 South Court Street, Montgomery, Alabama 36130.

Homicide data for Florida 1977: computerized Supplementary Homicide Reports, supplied by Alan Knudson, Bureau Chief, Uniform Crime Reports, Department of Law Enforcement, Post Office Box 1489, Tallahassee, Florida 32302.

Homicide data for Georgia 1977: xeroxed copies of individual Supplementary Homicide Report forms supplied by Jan Trace, Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, P.O. Box 1456, Atlanta, Georgia 30301.

Homicide data for Ohio 1977: computerized Supplementary Homicide Reports, supplied by Herman Slonecher, Data Systems Division Chief, Ohio Bureau of Criminal Identification, Post Office Box 365, Columbus, Ohio 43140.

Homicide data for Texas 1977: computerized Supplementary Homicide Reports, supplied by Cal Killingsworth, Manager, Uniform Crime Reporting Bureau, Texas Department of Public Safety, Post Office Box 4143, Austin, Texas 78765.

Homicide data from vital statistics agencies

Homicide data for Alabama 1976-1978: Vital Statistics figures, supplied by Robert Schiller, Chief Statistician, Division of Vital Statistics, State Department of Public Health, State Office Building, Montgomery, Alabama 36130.

Death sentence data from various sources

Death Sentences for Alabama: figures supplied by John Carroll, Southern Poverty Law Center, 1001 S. Hull Street, Montgomery, Alabama 36101.

Death Sentences for Florida: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Death Sentences for Georgia: forms supplied by Patsy Morris, Georgia Committee Against the Death Penalty, 88 Walter Street, N.W., Atlanta, Georgia 30303.

Death Sentences for Ohio: forms supplied by Steve Van Dine, Research Coordinator, Adult Parole Authority, 1050 Freeway Drive, N. Columbus, Ohio 43229.

Death Sentences for Texas: supplied by Eric Troseth, Office of Court Administration of the Texas Judicial System, 1414 Colorado St., Suite 600, P.O. Box 12066, Capitol Station, Austin, Texas 78711.

Appellate review data from court records

Life and death sentences reviewed by the Georgia Supreme Court, 1970-spring 1977: data collection instruments and card files of the Georgia Supreme Court obtained under subpoena and supplied by Millard Farmer, Team Defense, 15 Peachtree Street, Suite 831, Atlanta, Georgia.

Pre-*Furman* death sentence data from institutional files

Persons under the sentence of death at the time of the *Furman* decision in Florida: information coded

from the Florida Parole and Probation Commission manual records; access authorized by Charles Scriven, Chairman of the Florida Parole and Probation Commission, 1309 Winewood Blvd., Tallahassee, Florida 32301.

Persons under the sentence of death at the time of the *Furman* decision in Georgia: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.

Homicide data for Georgia, April 1973 to December 1977: computerized Vital Statistics records supplied by Anne Allen, Statistician, Office of Health Services and Statistics, Division of Physical Health, 47 Trinity Ave., S.W., Atlanta, Georgia 30334.

Homicide data for Ohio 1975-1977: Vital Statistics figures, supplied by Karl Wise, Chief, Division of Vital Statistics, Room 620, Ohio Departments Building, 65 South Front Street, Columbus, Ohio 43215.

Homicide data for Texas, 1973 to 1977: Vital Statistics tabulations supplied by Tom Pollard, Statistician, Bureau of Vital Statistics, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

Indictment through sentencing data from court records

First Degree Murder Indictment followed through sentencing for 20 Florida counties for 1973-1976: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jacksonville, Florida 32202.

Indictments at all levels followed through sentencing for 20 Florida counties, 1976-1977: forms supplied by Kay Isley, Citizens Against the Death Penalty, 215 Washington Street, Jascksonville, Florida 32202.

Post-conviction data from institutional records

Persons imprisoned for all degrees of criminal homicide for Florida 1973-1977: computerized records supplied by Jerry Smith, Chief of Research, Department of Offender Rehabilitation, 1311 Winewood Boulevard, Tallahassee, Florida 32301.

Persons imprisoned for all degrees of criminal homicide for Georgia, 1973-1977: computerized records supplied by Tim Carr, Chief of Statistics, Department of Offender Rehabilitation, 800 Peachtree Street, N.W., Atlanta, Georgia 30308.

Sample of persons imprisoned for all degrees of criminal homicide for Georgia, 1973-1977: information coded from Georgia Board of Pardons and Paroles manual records; access authorized by the Board of Pardons and Paroles, 800 Peachtree St., Room 610, Atlanta, Georgia 30308.

SUPREME COURT OF THE UNITED STATES

No. 84-6646

WILLIE LLOYD TURNER, PETITIONER

v.

ALLYN R. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

May 13, 1985

STATUTORY PROVISIONS FROM CODE OF VIRGINIA

§ 18.2-31. Capital murder defined; punishment.—The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 H when such killing is for the purpose of interfering with the performance of his official duties; and

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 300; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 607; 1982, 636.)

§ 19.2-264.1. Views by juries.—The jury in any criminal case may, at the request of either the attorney for

the Commonwealth or any defendant, be taken to view the premises or place in question, or any property, matter or thing relating to the case, when it shall appear to the court that such view is necessary to a just decision. (Code 1950, § 8-216; 1977, c. 624.)

ARTICLE 4.1.

Trial of Capital Cases.

§ 19.2-264.2. Conditions for imposition of death sentence. —In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ 19.2-264.3. Procedure for trial by jury.—A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty. (1977, c. 492; 1983, c. 519.)

§ 19.2-264.4. Sentence proceeding.—A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired; or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that

there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ..... foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ..... foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

§ 19.2-264.5. Post sentence reports.—When the punishment of any person has been fixed at death, the court

shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

OPINION OF THE COURT

SUPREME COURT OF VIRGINIA

Record No. 800375

WILLIE LLOYD TURNER

v.

COMMONWEALTH OF VIRGINIA

Nov. 26, 1980

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, POFF, COMPTON and THOMPSON, JJ.

LAWRENCE W. I'ANSON, Chief Justice.

The defendant, Willie Lloyd Turner, was convicted of capital murder, Code § 18.2-31(d)[1]; possession of a sawed-off shotgun in the commission of a crime of violence (robbery), Code § 18.2-300(A); and the use of a firearm (a pistol) in the commission of a felony (murder), Code § 18.2-53.1. The jury fixed Turner's punishment at one year in the penitentiary for violating Code § 18.2-53.1 and life imprisonment for violating Code § 18.2-300(A). In the second stage of the bifurcated proceeding conducted pursuant to Code §§ 19.2-264.3 and -264.4, the jury fixed the defendant's punishment for capital murder at death.

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[1] Code § 18.2-31(d) provides that "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon" constitutes a capital murder.

At the conclusion of a separate sentencing hearing conducted pursuant to Code § 19.2-264.5, the trial court sentenced the defendant to death for capital murder and sentenced him in accordance with the jury's verdicts on the other two offenses. The defendant is here for an automatic review of the death sentence, consolidated with his appeal from his several convictions. Code § 17-110.1.

I. FACTS

On July 12, 1978, at approximately 11:30 a.m., Willie Lloyd Turner, a black male, entered a jewelry store owned and operated by W. Jack Smith, Jr., a white male. In addition to Smith, an employee (Mary Huffman) and a customer were present when Turner entered the store. After entering the store, Turner displayed a sawed-off shotgun previously concealed by a towel and demanded money and jewelry. Smith, while placing money and jewelry into the store's jewelry bags, triggered a silent alarm alerting the police department.

Judith R. Cosby and Police Officer Alan D. Bain, having entered the store without knowing a robbery was in progress, were detained in the store by Turner. Having discovered Smith had triggered a silent alarm, Turner demanded that Smith turn off the alarm. After acceding to Turner's demand, Smith, along with Cosby, began placing additional valuables designated by Turner into jewelry bags.

Near the rear of the store, Turner examined a revolver taken from Bain and fired a bullet toward the rear wall. Turner stated if he saw or heard any additional police officers, he was going to start killing those in the store. About that time, Bain heard a siren. Turner then walked from the back of the store toward the middle of the store, where Smith was stationed behind a counter, and fired a bullet from the revolver at Smith without warning. Smith, with blood on his temple, slumped behind the counter. Bain began talking with

Turner, promising him to take him anywhere he wanted to go and asking him not to shoot again. While Bain talked with Turner, two occupants scrambled out the front door. After Turner told Bain he was going to kill Smith because he had triggered the silent alarm, Turner leaned over the counter and fired two bullets from the revolver into Smith's chest in rapid succession. Bain then grabbed and subdued Turner while Cosby ran out the front door. Smith died as a result of the bullets fired by Turner into Smith's chest.

II. JURY SELECTION AND SEQUESTRATION

Several of the defendant's assignments of error concern the manner in which voir dire was conducted. Over defense counsel's objections, the trial judge ruled that he alone would ask the questions of prospective jurors during voir dire. He also concluded that he would question jurors in groups of five, except when questioning jurors concerning their views on the death penalty. Although questioning concerning the death penalty occurred at least initially in groups of five, each prospective juror was required to answer individually at least two questions concerning capital punishment.[2] Prior to the day of trial, the court asked counsel for the Commonwealth and the defendant to submit questions they wished to have asked. Turner's counsel submitted a list of fifteen questions, nine of which were asked by the trial judge.

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[2] Jurors were asked variations of the following questions: "Do you have any religious or conscientious scruples or objections against the imposition of the death sentence?" and "Do you feel that in each and every case, regardless of the facts, where a person is convicted of murder he should receive the death penalty?" Those jurors answering no to both questions were deemed suitable, without further questioning, with respect to their attitude toward the death penalty. Those answering yes to either question were questioned further by the court.

A. REFUSAL TO ALLOW COUNSEL-CONDUCTED VOIR DIRE

The defendant contends that Code § 8.01-358 [3] gives both court and counsel an unconditional right to question prospective jurors directly and that the trial court abridged this statutorily created right by refusing to allow counsel-conducted voir dire. Citing Supreme Court Rule 3A:20(a),[4] the Commonwealth replies that the trial courts have discretion in determining whether to permit counsel-conducted voir dire.

The Constitution of Virginia, Art. VI, § 5, prohibits the promulgation of any court rule "in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Supreme Court Rule 3A:20(a) clearly makes the right to counsel-conducted voir dire contingent upon the trial court's approval. In resolving the issue before us, we must determine whether Code § 8.01-358 confers upon attorneys the unconditional right to question prospective jurors directly. If Code § 8.01-358 confers such a right, it prevails over

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[3] Code § 8.01-358 provides: "The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

"A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

[4] Supreme Court Rule 3A:20(a) provides that following mandatory questioning by the court as to seven potential grounds for juror exclusion, "the court, or counsel with permission of the court, may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror."

that portion of Rule 3A:20(a) which makes the exercise of that right contingent upon the trial court's approval.

The legislative history of § 8.01-358 is useful in discerning whether the General Assembly intended to confer such a right upon attorneys. The Code of 1887 § 3154 required trial courts to question prospective jurors when requested to do so by the litigants.[5] The Code of 1919 § 6000 enlarged a trial court's powers by providing that a court could question jurors even though not requested to do so by counsel.[6] The pertinent language remained unchanged for several decades. *See* Code of 1950 § 8-199 (1950). In 1966, the General Assembly amended Code § 8-199 to read as follows:

> "The court *and counsel for either party* may examine on oath any person who is called as a juror therein *and may ask such person or juror directly any relevant question* to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case."

Acts 1966, c. 496, at 676 (language added in 1966 italicized). On June 15, 1971, this court promulgated a comprehensive set of rules governing criminal practice and

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[5] Code of 1887 § 3154 provided, insofar as is pertinent, that "[t]he court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to ascertain" the juror's qualifications.

[6] Code of 1919 § 6000 provided, insofar as is perinent, that "[t]he court shall, on motion of either party in any suit, or may of its own accord," examine any prospective juror.

procedure, to be effective January 1, 1972. One of these rules was Rule 3A:20, which unambiguously gives the trial court discretion in determining whether to allow counsel-conducted voir dire. 211 Va. cvi (1971). Code § 8-199 was recodified as Code § 8-208.28 in 1973 without any change. Acts 1973, c. 439, at 651-52. In another recodification, the texts of Code §§ 8-215 (1957 Repl.Vol)[7] and 8-208.28 were combined to form the present text of Code § 8.01-358. Acts 1977, c. 617, at 1111.

As both parties recognize, we have not previously resolved whether the 1966 amendment to this statute confers upon attorneys an unconditional right to participate directly in voir dire. In *Harmon v. Commonwealth*, 209 Va. 574, 166 S.E.2d 232 (1969), we held that when a litigant's attorney has agreed that the judge alone would ask the voir dire questions, he or she cannot require the trial judge to exercise that right in a particular fashion. In upholding Harmon's conviction, we concluded that the statutory *permission* for the court to ask such questions directly does not *require* a court to do so. Thus, the trial court was permitted, but not required as contended by Harmon, to question jurors individually. In regard to voir dire conducted by counsel, we noted that the propounding of questions by the trial judge, and not by counsel for the defendant, was "in accordance with the usual practice." 209 Va. at 579, 166 S.E.2d at 236. We also concluded that the word "may" "is not mandatory but permissive and leaves the matter to the discretion of the trial court." 209 Va. at 580, 166 S.E.2d at 236.

Prior to the 1966 amendment, the litigants' counsel had no authority whatsoever for directly participating in voir dire examinations. "Although the statute formerly required the judge alone to ask the questions, in practice most trial courts *permitted* counsel to ask them di-

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[7] Code § 8-215 (1957 Repl.Vol.) provided: "A juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

rectly." Boyd, *Practice and Pleading—The Twelfth Annual Survey of Virginia Law: 1966, 1967*, 53 Va.L. Rev. 1763, 1781 (1967) (emphasis added). The 1966 amendment "sanction[ed] this deviation and [brought] Virginia in line with the procedure in other jurisdictions." *Id.* Thus, the amendment authorized what was already in fact occurring: counsel's participation in voir dire when permitted by the trial court.

Cognizant that the statutory language might be subject to different interpretations, this court in 1971 promulgated Rule 3A:20(a) of the Rules of Criminal Practice and Procedure. This Rule, which clearly makes counsel's participation in voir dire contingent upon the trial court's approval resolved any ambiguity present in the statutory language.

Turner suggests that, even if Code § 8.01-358 confers no unconditional right to counsel-conducted voir dire, the trial court abused its discretion in refusing to allow defense counsel to question prospective jurors directly and in not questioning each prospective juror out of the presence of other jurors. While the defendant has a constitutional right to a fair and impartial jury, he has no constitutional right to counsel-conducted voir dire. *See, e.g., United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970). In the absence of a statute or court rule to the contrary, as long as the selection procedure results in a fair and impartial jury, the manner in which a jury is to be selected is properly within the trial court's sound discretion. Thus, the trial court's refusal to question jurors individually out of the presence of other prospective jurors and the court's refusal to allow counsel-conducted voir dire do not represent an abuse of discretion. *See Dean v. Commonwealth*, 209 Va. 666, 669, 166 S.E.2d 228, 230 (1969). We have carefully examined the voir dire conducted by the trial judge and believe it resulted in a fair and impartial jury. Under

such circumstances, we cannot say the trial judge abused his discretion.

B. REFUSAL TO ASK SPECIFIC QUESTIONS PROPOSED BY DEFENSE COUNSEL

As noted previously, the trial court refused to ask several questions proposed by defense counsel.[8] Turner contends that the failure to ask these questions constituted prejudicial error.

The pre-1966 text of what is now Code § 8.01-358 provided that "[t]he court shall, on motion of either party in any suit, examine" jurors to ascertain their qualifications concerning impartiality and lack of bias. The 1966

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[8] Of the fifteen questions submitted by defense counsel, one question was withdrawn, nine were asked by the trial judge, and five were refused. These five questions were:

"(10) The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?

(11) Do you feel that if a person is to be given the death penalty for the unlawful killing of another person, such penalty should be given only if such killing is of the most severe and aggravated nature?

(13) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty?

(14) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if there is a probability that the person would commit criminal acts of violence that would constitute a continuing threat to society?

(15) Do you feel that every person convicted of the unlawful killing of another person during a robbery should receive the death penalty if his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder?"

amendment deleted this requirement, providing merely that "the court . . . may examine [a prospective juror] and may ask [such juror] any relevant question." In *Harmon v. Commonwealth*, 209 Va. at 580, 166 S.E.2d at 236, we held that this statutory language "is not mandatory but permissive and leaves the matter to the discretion of the trial court." With the exception of seven questions, all of which were asked in this case, Rule 3A:20(a) makes voir dire questioning entirely discretionary with the trial court. Unless the refusal to ask a question amounts to a denial of due process or otherwise impinges upon the right to a fair and impartial jury, *see, e.g., Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), the present wording of Code § 8.01 358 and Rule 3A:20(a) empowers a trial court to use its discretion in determining whether to ask questions proposed by either the Commonwealth or the defendant.

The trial court's refusal to ask the questions proposed by defense counsel did not impinge upon the defendant's right to a fair and impartial jury. While "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant," a trial court's refusal to do so is not constitutionally objectionable in the absence of factors similar to those in *Ham*.[9] *Ristaino v. Ross*, 424 U.S. 589, 597 n.9, 96 S.Ct. 1017, 1022 n.9, 47 L.Ed.2d 258 (1976). The mere fact that a defendant is black and that a victim is white does not constitutionally mandate such an inquiry. *Lewis v. Commonwealth*, 218 Va. 31, 35-36, 235 S.E.2d 320, 323 (1977). The refusal of the

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[9] Turner introduced a study indicating that black defendants killing white victims receive the death penalty more frequently than black defendants killing blacks, whites killing blacks, or whites killing whites. The study, however, was based upon statistics compiled in other states and thus was of little utility in establishing the potential of prejudice in Virginia.

trial court to ask other questions, those concerning the circumstances under which a prospective juror would vote for the death penalty, likewise is not constitutionally objectionable. The voir dire questioning conducted by the trial judge probed many of the areas touched upon by these questions and assured the removal of those who would invariably impose capital punishment. The court's instructions to the jury clearly delineated the circumstances in which the death penalty could be imposed. Since the questioning actually conducted by the court preserved the defendant's right to a fair and impartial jury, the trial court's refusal to ask the voir dire questions proposed by defense counsel was not an abuse of discretion.

C. EXAMINATION OF PROSPECTIVE JURORS CONCERNING ATTITUDES ABOUT CAPITAL PUNISHMENT

For the reasons stated in *Waye v. Commonwealth*, 219 Va. 683, 690-91, 251 S.E.2d 202, 207, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979), we reject Turner's contention that the trial court should not have questioned prospective jurors concerning their willingness to impose capital punishment

We likewise believe that the trial court properly struck Samuel Cypress from the venire. After asking Cypress variations of the questions asked of others on the panel,[10]

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[10] The complete examination of Cypress appears below:

"THE COURT: Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?

MR. CYPRESS: Well, really, I don't go for the death penalty.

THE COURT: Can you say yes or no to that question?

MR. CYPRESS: No.

THE COURT: Or yes?

MR. CYPRESS: Do I have any objection?

THE COURT: Yes.

[Continued]

the trial judge concluded that Cypress' objections to capital punishment were absolute. While jurors may not be excluded "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed. 2d 776 (1968), those jurors irrevocably committed to voting against the death penalty may be excluded. *Coppola v. Commonwealth*, 220 Va. 243, 250, 257 S.E. 2d 797, 802 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980); *Smith v. Commonwealth*, 219 Va. 455, 464, 248 S.E.2d 135, 141 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). The trial court's determination that a juror is irrevocably committed to voting against the death penalty will not be disturbed on appeal unless we can say the prospective juror's commitment against the death penalty was not "unmistakably clear." *Smith v. Commonwealth*, 219 Va. at 465, 248 S.E.2d at 141. *Accord, Coppola v. Commonwealth*, 220 Va. at 250, 257 S.E.2d at 802. On the basis of the answers given by Cypress, the trial court reasonably concluded he was irrevocably committed against the death penalty.

D. SEQUESTRATION OF THE JURY

Turner sought and obtained a change of venue from Southampton County to Northampton County. Upon learning of a recent Northampton County case involving

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[10] [Continued]

MR. CYPRESS: Yes.

THE COURT: Is your objection to the death penalty absolute?

MR. CYPRESS: Well, I would say yes.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Didn't hear.

THE COURT: Could you in a proper case impose the death penalty?

MR. CYPRESS: Well, I can't see where it helps any."

the death penalty and another murder in the area, defense counsel moved for another change in venue and for sequestration of the jury, both of which were denied. Turner contends that the refusal to sequester the jury was prejudicial error.

As Turner's counsel notes, a judge has discretion in determining whether to sequester a jury. The mere fact of media coverage does not require a judge to sequester a jury. *Thompson v. Commonwealth*, 219 Va. 498, 247 S.E.2d 707 (1978). A trial judge's discretion regarding sequestration extends to cases involving capital punishment. We hold that, in the absence of any indication of pretrial prejudicial publicity, a trial judge has wide discretion in deciding whether to sequester a jury.

III. CONSTITUTIONALITY OF THE DEATH PENALTY PROVISIONS

A. FACIAL CONSTITUTIONALITY

Turner contends that Virginia's statutory provisions concerning the death penalty are facially unconstitutional for reasons previously rejected by us. *See Martin v. Commonwealth*, 221 Va. 436, 440, 271 S.E.2d 123, 126 (1980); *Mason v. Commonwealth*, 219 Va. 1091, 1094-95, 254 S.E.2d 116, 118-19 (1979); *Waye v. Commonwealth*, 219 Va. 683, 698-99, 251 S.E.2d 202, 211 (1979); and *Smith v. Commonwealth*, 219 Va. 455, 476-79, 248 S.E.2d 135, 148-49 (1978). We reaffirm these prior holdings concerning the facial constitutionality of the death penalty statutory provisions.

Turner also argues that the imposition of the death penalty on the basis of a jury's conclusion regarding a defendant's propensity for future crime is unconstitutional.[11] The statutory objective of isolating a criminal,

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[11] Turner does not contend that the jury had no basis for concluding he would probably commit "criminal acts of violence that

according to Turner, can be accomplished through the less drastic measure of life imprisonment. As Turner acknowledges, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), upheld as constitutional a Texas statute allowing the imposition of the death penalty where a jury determines, *inter alia*, the defendant would probably commit "criminal acts of violence that would constitute a continuing threat to society." 428 U.S. at 269, 96 S.Ct. at 2955. While the only issue explicitly addressed concerning a defendant's propensity for future criminal conduct was whether the jury was being asked to resolve a question beyond its competency, 428 U.S. at 274-76, 96 S.Ct. at 2955-2958, we believe *Jurek* holds that a defendant's propensity for future criminal acts of violence is an acceptable consideration in determining whether to impose the death penalty. *See also Gregg v. Georgia*, 428 U.S. 153, 183 n.28, 96 S.Ct. 2909, 2930 n.28, 49 L.Ed.2d 859 (1976) (plurality opinion).

B. CONSTITUTIONALITY AS APPLIED

Citing *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), Turner contends there was insufficient evidence to support a conclusion that his conduct in committing the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery." Code § 19.2-264.2. As we noted in (*James Dyral*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (1980), *Godfrey* rested upon its unique facts. The *Godfrey* prosecutor conceded the defendant had not tortured the victims or committed an aggravated battery upon

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would constitute a continuing serious threat to society . . . ." Code § 19.2-264.2. Since 1974, the defendant, has been convicted of malicious maiming, escape, unlawful wounding, malicious wounding, and second-degree murder. Four of these offenses occurred in the penal system.

them. 100 S.Ct. at 1763. Godfrey had no prior criminal record. Thus, the death sentence rested upon the jury's finding that Godfrey's actions had been "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind." 100 S.Ct. at 1767. Rejecting such a conclusion as unconstitutional, the Supreme Court of the United States noted several facts: Godfrey's victims, family members who had caused him "extreme emotional trauma," were killed instantaneously; and shortly after the killings Godfrey acknowledged his involvement and the heinous nature of his crimes. *Id.* Godfrey's crimes were not deemed to reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.* In summary, the state had not proven "a principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*

The second clause of Code § 19.2-264.2 (hereafter, the "vileness" clause) provides specific criteria which must be met before the death penalty can be imposed on the basis of this clause. The conduct in committing the offense must be deemed to be "outrageously or wantonly vile, horrible or inhuman." Code § 19.2-264.2. Second, the jury must conclude that the conduct establishes one of the following: torture of the victim, an aggravated battery of the victim, or the perpetrator's depravity of mind. *See Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

In the present case, the Commonwealth established that Turner's conduct was "outrageously or wantonly vile, horrible or inhuman." Turner first shot Smith in the head without warning. After Smith slumped behind the counter, Bain immediately pleaded with Turner not to fire any more. After the defendant had fired one bullet hitting the rear wall and another one hitting Smith's head, Cosby became nauseous and asked if she could be seated. Rejecting Bain's pleas, Turner then leaned over the counter and fire two bullets into

Smith's chest. While Smith was slumped behind the counter, Cosby heard him "gurgling." The evidence also establishes Turner committed an "aggravated battery": a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). After being wounded by Turner, Smith slumped helplessly behind the counter. Unlike Godfrey's victims, Smith did not die instantaneously from a single discharge of a firearm.

Virginia's death penalty statute authorizes the imposition of the death penalty if either the "dangerousness" or "vileness" standard is met. Even if Turner's crime did not meet the "vileness" standard, imposition of the death penalty would be permissible under the "dangerousness" standard.[12] On the basis of Turner's prior criminal record, set forth in footnote 11, the jury could reasonably conclude that the defendant would probably "commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

IV. REFUSAL TO INSTRUCT THE JURY CONCERNING MURDER IN THE COMMISSION OF AN ATTEMPTED ROBBERY

Code § 18.2-31(d), as noted earlier, provides that murder "in the commission of robbery" while armed with a deadly weapon is capital murder. Code § 18.2-32 pro-

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[12] As in *(James Dyral) Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (this day decided), the jury returned a sentencing verdict without (striking out the inapplicable language ("and" or "or"). Unlike in *Briley*, however, the trial judge in Turner's case refused to ask the jury members, either individually or collectively, whether their sentencing verdict was grounded upon the "dangerousness" or "vileness" standard or both. While the trial judge's refusal was not prejudicial error, it would accord with better practice to determine with certainty the basis for the jury's sentence. Such a procedure would greatly facilitate the process of appellate review.

vides that murder "in the commission of, or attempt to commit," robbery is first-degree murder. Whereas Code § 18.2-32 is violated by a murder in an attempted robbery, Code § 18.2-31(d) is not. To be convicted under Code § 18.2-31(d), the defendant must have committed a robbery.

Turner contends that the jury should have been instructed concerning the lesser offense of first-degree murder because the evidence failed to establish the commission of a robbery. While Turner never had physical possession of the jewelry bags personally, we believe the requirement of asportation has been satisfied in this case. "This degree of asportation necessary to constitute a taking under the common law definition of robbery need be only slight." *Durham v. Commonwealth*, 214 Va. 166, 168, 198 S.E.2d 603, 606 (1973). A perpetrator exercises dominion and control over an object where he commands another to seize the object and the person complies. In this case, Turner at gunpoint commanded Smith and Cosby to place money and valuables into jewelry bags owned by the store. Placing the money and valuables into the bags as requested, Smith and Cosby then put the bags on the counter. Turner exercised dominion and control over the money and valuables when Smith and Cosby asported these items at his command.

V. DOUBLE JEOPARDY

Citing *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), Turner contends that the Double Jeopardy Clause of the United States Constitution [13] was violated when he was convicted of the use of a firearm in the commission of a felony, Code § 18.2-

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[13] U.S. Const., amend. V, provides that no one in a criminal case "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

53.1,[14] as well as murder in the commission of a robbery "while armed with a deadly weapon," Code § 18.2-31(d). In *Busic*, the Supreme Court held that 18 U.S.C. § 924 (c), providing enhanced punishment for one using or carrying a firearm [15] in the commission of a felony, could not be applied to a defendant using a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a deadly weapon is used. Both *Busic* and its precursor, *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), were based upon a determination of Congressional intent.

The constitutional prohibition of double jeopardy consists of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 2264, 65 L.Ed.2d 222 (1980) quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656

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[14] Code § 18.2-53.1 provides that: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction. Violation of this section shall constitute a separate and distinct felony and any person found guilty thereof shall be sentenced to a term of imprisonment of one year for a first conviction, and for a term of three years for a second or subsequent conviction under the provisions of this section. Notwithstanding any other provision of law, the sentence prescribed for a violation of the provisions of this section shall not be suspended in whole or in part, nor shall anyone convicted hereunder be placed on probation. Such punishment shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony."

[15] Firearm, as defined in 18 U.S.C. § 921, includes a number of destructive devices not generally deemed to be firearms. *See Simpson v. United States*, 435 U.S. at 10, n.4, 98 S.Ct. at 911, n.4.

(1969). In determining whether a defendant has been twice convicted for the "same offense," U.S.Const., amend. V, courts have been guided by the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932): "[T]he test to be applied to determine whether there are two offenses or only one, is whether each [statutory] provision requires proof of a fact which the other does not."

We need not resolve whether one convicted of the use of a firearm in the commission of a felony (Code § 18.2-53.1) and murder in the commission of a robbery while armed with a deadly weapon [Code § 18.2-31(d)] has been convicted twice for the "same offense" under the *Blockburger* test.[16] As noted earlier, the defendant's convictions stem from a single criminal trial. Consequently, only the third constitutional guarantee (the guarantee against multiple punishments) is at issue in this appeal. The constitutional guarantee against multiple punishments "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977). Where two or more punishments for separate

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[16] The statutory provisions at issue in this case are similar to those at issue in *Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich. 374, 280 N.W.2d 793 *appeal dismissed for want of a substantial federal question sub nom., Brintley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979) (use of a firearm in the commission of a felony and robbery "while armed with a dangerous weapon.") Under *Hicks v. Miranda*, 422 U.S. 332, 343-45, 95 S.Ct. 2281, 2288-2290, 45 L.Ed.2d 223 (1975), the Supreme Court's dismissals for want of a substantial federal question are dispositive precedent for those issues presented in a petitioner's appeal. In light of our conclusion concerning the significance of legislative intent on the issue before us, it is unnecessary to determine whether the Supreme Court's dismissal for want of a substantial federal question adjudicated whether felony-firearm and robbery "while armed with a dangerous weapon" constituted the same offense under *Blockburger*.

statutory violations are imposed in a single criminal proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to impose." *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 1441, 63 L.Ed.2d 715 (1980) (Blackmun, J., concurring).

The General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 provides that a "[v]iolation of this section shall constitute a separate and distinct felony" and that the punishment imposed for violating Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." This language reflects an unambiguous intent to authorize multiple punishment for a single criminal transaction. Thus, Turner's double jeopardy claim has no merit.

VI. REVIEW REQUIRED BY CODE § 17-110.1

Code § 17-110.1(C)(1) requires that we consider and determine whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." We have carefully considered the record in this case and find no indication that the death sentence was the product of these enumerated factors.

Code § 17-110.1(C)(2) requires us, after "considering both the crime and the defendant," to determine whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases." We have reviewed death sentences in those cases involving murder in the commission of a robbery while armed with a deadly weapon. (*James Dyral*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 57 (1980); (*Linwood*) *Briley v. Commonwealth*, —— Va. ——, 273 S.E.2d 48 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808

(1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper*, (*James Dyral*) *Briley*, or *Coppola*, Turner's murder is just as brutal as the murders in (*Linwood*) *Briley* and *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980). Moreover, the defendant's criminal record, detailed in footnote 11, is one of the most extensive we have reviewed under Code § 17-110.1(C). Turner, unlike any of the other defendants except for Mason,[17] had been convicted for a previous murder. Certainly his prior criminal record is as extensive or more extensive than the criminal records of those other defendants sentenced to death for murder in the commission of an armed robbery. Having considered "both the crime and the defendant," Code § 17-110.1 (C)(2), we conclude the death sentence is not excessive or disproportionate to the sentences imposed in similar cases.

VII. OTHER ASSIGNMENTS OF ERROR

For the reasons stated in (*James Dyral*) *Briley v. Commonwealth*, *supra*, and (*Linwood*) *Briley v. Commonwealth*, *supra*, we reject Turner's contention that a further change in venue was necessary. We likewise reject his argument that photographs of the victim and crime scene should not have been introduced into evidence. *Waye v. Commonwealth*, 219 Va. at 692, 251 S.E. 2d at 207-08. Moreover, Turner's contention that the jury should have been given an instruction concerning

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[17] *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

the possibility of parole has no merit. *Stamper v. Commonwealth*, 220 Va. at 278, 257 S.E.2d at 821; *Clark v. Commonwealth*, 220 Va. at 214, 257 S.E.2d at 792.

Turner raises several other assignments of error, discussed neither in his brief nor in oral argument. After examining each of these assigned errors, we conclude that they have no merit and require no further discussion.

Having given the defendant's case both appellate and independent review, we conclude there is no reversible error in either his convictions or sentences, and we find no other reason to disturb or commute his death sentence. Therefore, we affirm the judgments pronounced by the trial court.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 83-501-N

WILLIE LLOYD TURNER, #95190, PETITIONER

v.

GARY BASS, SUPERINTENDENT, ET AL., RESPONDENTS

[Filed May 23, 1984]

MEMORANDUM ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system.

Petitioner is being detained pursuant to a judgment of the Circuit Court of Southampton County, Virginia of February 19, 1980, wherein petitioner was convicted of capital murder, use of a firearm in the commission of murder, and possession of a sawed off shotgun in the commission of robbery. He was sentenced to respective sentences of death, one year in the penitentiary, and a life term in the penitentiary. The death sentence was imposed in a separate hearing from the trial on guilt or innocence as is required in Va. Code §§ 19.2-264.3 and 19.2-264.4 (1950). These convictions arose out of events occurring on July 12, 1978, during which petitioner shot and killed the proprietor of a jewelry store in Franklin, Virginia.

Petitioner appealed his convictions to the Supreme Court of Virginia. On November 26, 1980, that Court issued a written opinion in which it affirmed petitioner's conviction in all respects.

* * * *

(f) Petitioner argues that execution by means of electrocution constitutes cruel and unusual punishment. This argument is contrary to the decision of the Supreme Court and is thus without merit. *In Re Kemmler*, 136 U.S. 436 (1890); *Gregg v. Georgia*, 428 U.S. at 170, 178; *See also Gray v. Lucas*, 710 F.2d 1048, 1060 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 211 (1983).

Voir Dire

Petitioner has alleged that the *voir dire* conducted at his trial was flawed in several respects.

The trial judge conducted the *voir dire*, using certain of the questions which counsel for both sides had submitted to him. The prospective jurors were called forward in groups of five while the remainder were excluded from the courtroom. Those five were first asked, as a group, to respond to several questions. Each prospective juror was then asked individually as to his or her feelings concerning the death penalty. These responses were elicited for the purpose of "death-qualifying" the jury, a process approved in *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Adams v. Texas*, 448 U.S. 38 (1980). The Supreme Court in *Witherspoon* held that those prospective jurors who express an absolute opposition to the death penalty may be excluded from service as jurors in a capital murder case. The trial court struck for cause three jurors who expressed an absolute opposition to the imposition of the death penalty. (The trial court also struck several prospective jurors who stated that they

believed that the death penalty was the appropriate punishment for anyone convicted of murder.)

The petitioner argues that there was error both in the type of questions asked and in the manner in which the *voir dire* was conducted. Each complaint will be dealt with below.

(a) Petitioner's first assignment of error involves the death qualification of the jury as authorized in *Witherspoon*. Petitioner argues that the death qualification process yields a venire which does not represent a cross-section of the community and a jury which is conviction-prone. Petitioner has offered to produce data which, he contends, will establish the truth of his assertions. While the arguments which petitioner made at the earlier proceedings were less fully developed than they now appear to be, this Court will consider petitioner's present arguments in their entirety.

The Fourth Circuit has spoken twice on this issue. First, one of the petitioner's claims in *Barfield v. Harris*, 719 F.2d 58 (4th Cir. 1983) was identical to the argument now made by petitioner in the case at bar. In *Barfield*, the Fourth Circuit affirmed the district court's decision to deny relief to *Barfield* on this claim. *Barfield v. Harris*, 540 F.Supp. 451, 464 (E.D.N.C. 1982). Second, the petitioner in *Hutchins v. Woodard, et al.*, No. 84-8050, slip op. (4th Cir. March 13, 1984) sought a certificate of probable cause to appeal and a stay of execution on the same ground that Turner pursues here. The Fourth Circuit declined to grant the certificate and the stay. In the lead opinion, Judge Murnaghan wrote, *inter alia*, that Hutchins did not have a decided or substantial chance of prevailing on the merits of this issue. *See, Barefoot v. Estelle*, —— U.S. ——, 103 S.Ct. 3383 (1984). It appears to this Court that Judge Phillips may have reached a similar conclusion. It is important to note that the decision in *Hutchins* followed the issuance of the opinion in *Keeten, et al. v. Garrison*, 578 F.Supp. 1164 (W.D.N.C. 1984) in which Judge McMillan found

merit in the same argument which petitioner now makes to this Court. Although the Fourth Circuit made quite clear its desire that *Hutchins* was not to be considered *res judicata or stare decisis* on this issue, this Court reads the opinions of Judges Murnaghan and Phillips as indicating their belief that the view expressed in *Keeten* will probably not prevail in this Circuit.

Moreover, a significant number of courts which have treated this issue have disagreed with the position taken by petitioner, *e.g.*, *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); *Smith v. Balkcom*, 660 F.2d 573; *Spinkellink v. Wainwright*, 578 F.2d 582. While it is true that two district courts recently have found merit in petitioner's claim, *Keeten*, 578 F. Supp. 1164; *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), this Court is impressed with the reasoning of those cases which reject petitioner's arguments. Indeed, the decisions of these courts establish that, even assuming the validity of the social science data which petitioner would proffer to substantiate his claim, *see*, *Keeten*, 578 F.Supp. 1164; *Grigsby*, 569 F.Supp. 1273, petitioner's argument must fail. Accordingly, the Court adopts the reasoning in *Spinkellink*, 578 F.2d at 591-99, and concludes that petitioner is not entitled to relief as to this claim. *See also*, *Barfield*, 540 F.Supp. at 464. In addition, this Court concludes that an evidentiary hearing on this claim is not warranted. *See*, *Townsend v. Sain*, 372 U.S. 293 (1963).

(b) As discussed above, the trial judge questioned the prospective jurors individually in order to ascertain if any one should be excluded on *Witherspoon* grounds. Petitioner has argued that Samuel Cypress was improperly struck from the jury because, according to petitioner, Cypress did not express an unequivocal opposition to the death penalty. However, the Court finds petitioner's argument to be without merit.

According to the principles announced in *Witherspoon*, a juror may not be excluded merely because he or she

objects to the death penalty. *Witherspoon* provides for the exclusion of those prospective jurors,

> . . . who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . .

Id. at 522-23, n.21 (emphasis in original); *Adams v. Texas*, 448 U.S. 38.

At the conclusion of Cypress' individual *voir dire*, the trial court granted the Commonwealth's motion and excused Cypress for cause. Tr. at 91 (December 3, 1979). While the rule in *Witherspoon* and *Adams* is clear, there is no magic formula by which a trial judge can determine who is properly excludible. Therefore, it becomes important for the trial judge to gauge a prospective juror's demeanor and manner of responding to the questions. As a result, trial judges are generally given a great deal of discretion in evaluating juror impartiality. *Darden v. Wainwright*, 699 F.2d 1031 (11th Cir. 1983). Moreover, this Court must defer to the factual finding made by the state court on this issue. 28 U.S.C. § 2254 (d); *Sumner v. Mata*, 449 U.S. 539 (1981).

This Court is satisfied that the trial judge acted properly in excusing Cypress from service on the jury. Throughout the *voir dire*, the judge demonstrated a familiarity with the principles embodied in *Witherspoon* and *Adams*. In questioning Cypress, the trial judge carefully followed up Cypress' initial, and somewhat equivocal, response. The judge received answers which he felt required that Cypress be removed for cause. In sum, this Court refuses to accede to petitioner's request that we second guess the finding of the trial judge on this matter.

(c) Petitioner has complained that his counsel was denied the opportunity to conduct *voir dire*, in violation

of petitioner's Sixth and Fourteenth Amendment rights. At trial, petitioner's counsel timely requested that they be permitted to conduct, in whole or in part, the *voir dire* of the prospective jurors. The trial judge denied counsel's motion and conducted the entire *voir dire* himself.

On direct appeal, the Supreme Court of Virginia settled any question as to the trial court's authority to conduct the *voir dire* under Va. Code § 8.01-358 and Supreme Court Rule 3A:20; *Turner v. Commonwealth*, 273 S.E.2d 36. Naturally, this Court defers to the interpretation of Virginia law provided by the Virginia Supreme Court. *Wicker v. National Surety Corporation*, 330 F.2d 1009, 1012 (4th Cir. 1964), *cert. denied*, 379 U.S. 838 (1964).

Petitioner contends, however, that this procedure deprived him of his constitutional right to a fair trial. In *United States v. Duke*, 409 F.2d 669 (4th Cir. 1969), *cert. denied*, 397 U.S. 1062 (1970), the Fourth Circuit held that Rule 24 of the Federal Rules of Criminal Procedure is constitutional, including that aspect of the Rule which permits the trial court to conduct the *voir dire*. The Court concluded that there were substantial reasons for permitting the trial court to conduct *voir dire*. These reasons are even more compelling in the *Witherspoon* context where the trial judge must decide whether a prospective juror is unequivocally opposed to the death penalty. In such a situation, where a person's conscience and moral beliefs must be probed, it might be preferable for the judge himself, as an impartial party, to conduct the *voir dire*. Indeed, there is the possibility that counsel for either side could, through their questions, confuse or prejudice the prospective jurors. In sum, the trial judge's decision to conduct the *voir dire* did not infringe any of petitioner's constitutional rights.

(d) Petitioner has also complained that the trial court deprived him of a fair trial by refusing to permit indi-

vidual *voir dire*, to ask prospective jurors as to their racial attitudes and to probe their understanding of the presumption of innocence. Petitioner's argument fails.

The trial judge retains wide discretion in determining the way in which *voir dire* will be conducted. *Ristaino v. Ross*, 424 U.S. 589, 594 (1976); *Aldridge v. United States*, 283 U.S. 308 (1931). As noted above, the trial judge chose to question the jurors individually as to their feelings regarding the death penalty, although the other questions were asked of the jurors as a group. The decision as to whether, and to what extent, the prospective jurors should be questioned individually falls squarely within the ambit of the judge's discretion. This Court finds no reason, of a constitutional dimension, to upset the trial judge's decision to conduct the *voir dire* as he did.

This Court also will not disturb the trial court's decision not to question jurors as to their racial attitudes. The Supreme Court considered this issue in *Ristaino*, 424 U.S. 589. In *Ristaino*, the Court held that defendant was not entitled to have prospective jurors questioned about racial prejudice because the facts in that case "did not suggest a signficant likelihood that racial prejudice might infect [defendant's] trial." *Id.* at 598. *Compare, Ham v. South Carolina*, 409 U.S. 524 (1973) (black defendant was civil rights activist asserting defense that he was "framed"). In *Ristaino*, unlike in *Ham*, racial issues were not "inextricably bound up with the conduct of the trial." *Ristaino* at 596. The Court further stated that the mere fact that the defendant was black and the victim was white did not require the trial court to inquire as to the racial attitudes of the prospective jurors. *Id.* at 597.

In the case at bar, petitioner has not shown that an investigation of the racial attitudes of prospective jurors was necessary as racial issues are not inextricably bound up with the facts at trial. And as in *Ristaino*, the fact that petitioner is black and his victim was white did

not entitle petitioner to have such questions asked. (Petitioner has cited *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) as support for his position. However, that case does not, in any way, affect the conclusion reached by this Court. The plurality opinion in *Rosales-Lopez*, joined in this respect by Justices Burger and Rehnquist, reiterates that the *Ristaino* standard is to be used to determine when the *Constitution* requires that the racial attitudes of prospective jurors be investigated. *Id.* at 189-90.)

Finally, petitioner has argued that the trial judge never inquired as to the ability of the prospective jurors to understand and apply the presumption of innocence. There is no merit to this contention. The trial judge asked all prospective jurors whether they had "formed any opinion with regard to the guilt or innocence" of the petitioner. E.g. Tr. at 47 (December 3, 1979). None of the prospective jurors indicated that they had done so. There was, therefore, no need for the trial judge to inquire further. In light of the deference to be accorded the trial judge, this Court sees no constitutional infirmity with the way the judge handled the *voir dire*.

(e) Finally, the petitioner has argued that he has a constitutional right to meaningful *voir dire* so that he may make intelligent preemptory challenges. Petitioner claims this right was infringed here. However, the Constitution does not guarantee petitioner a right to exercise peremptory challenges at all. *Swain v. Alabama*, 380 U.S. 202, 219 (1966); *see, United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

The trial judge gave petitioner the opportunity to exercise peremptory challenges. Petitioner has not shown that he was unable to exercise them properly. Moreover, as discussed above, the trial judge has much discretion in conducting the *voir dire*. This Court concludes, after reviewing the record, that the *voir dire* did not impermissibly infringe the petitioner's exercise of the peremptory challenges he was allotted.

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OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-4004

WILLIE LLOYD TURNER, APPELLANT

v.

GARY BASS, SUPERINTENDENT, APPELLEE

Argued Oct. 2, 1984

Decided Jan. 25, 1985

J. Lloyd Snook, III, Charlottesville, Va. (Paxson, Smith, Gilliam & Scott, Charlottesville, Va., on brief), for appellant.

Robert H. Anderson, III, Asst. Atty. Gen., Richmond, Va. (Gerald L. Baliles, Atty. Gen. of Va., Richmond, Va., on brief), for appellee.

Before WIDENER, HALL and PHILLIPS, Circuit Judges.

WIDENER, Circuit Judge:

In December 1979 Willie Lloyd Turner was tried by a jury in Northampton County, Virginia and found guilty of capital murder.[1] Pursuant to Va.Code § 19.2-264.4, the jury sentenced Turner to death. Turner unsuccessfully appealed his conviction and sentence to the

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[1] Turner was indicted in Southampton County, Virginia. A motion for a change of venue was granted and he was tried in Northampton County.

Virginia Supreme Court. *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). The United States Supreme Court denied Turner's petition for a writ of certiorari. 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

Turner then filed a petition for a writ of habeas corpus in the circuit court of Southampton County, Virginia. That petition was denied. The Virginia Supreme Court affirmed that denial. The United States Supreme Court once again denied Turner's petition for a writ of certiorari. —— U.S. ——, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Turner next sought relief in the federal courts. On July 27, 1983, he filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, raising numerous constitutional issues.[2] That petition was amended on March 20, 1984. The petition was initially denied on May 23, 1984, and a motion to alter or amend that judgment was denied July 19, 1984. The district court issued a certificate of probable cause, thus allowing Turner to appeal the denial of habeas corpus relief. This denial serves as the basis of the present appeal.[3] We affirm.

A brief summary of the facts leading to Turner's conviction are necessary for an understanding of the issues presented. On July 12, 1978, Turner entered Smith Jewelers in Franklin, Virginia, armed with a sawed-off shotgun, and demanded that the store owner W. Jack Smith give him money and jewelry. A store employee and a customer were also present in the store at the time. Another customer entered during the robbery. Smith set off the store's silent alarm, and momen-

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[2] Turner has exhausted his state remedies as required by *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

[3] Turner's execution date was set for September 19, 1984. On August 28, 1984, this court entered a stay pending further order of this court.

tarily police officers A.D. Bain arrived on the scene and inquired about the activation of the alarm. Bain's pistol was taken by Turner. Turner then told Smith to turn the alarm off and keep filling bags with jewelry.

Turner soon became concerned that other police officers would respond to the alarm. He then fired a pistol shot into the back of the store. Officer Bain tried to assure Turner that no other policemen would be answering the alarm. Without any warning and with no provocation, Turner then shot store owner, Smith, in the head. The shot in the head did not kill Smith. It passed through his scalp, but apparently not through the skull. It caused bleeding on the coverings of the brain and bruised the brain's surface. Smith slumped and then fell helplessly to the floor. Officer Bain pleaded with Turner not to shoot anyone else, and offered to take Turner anywhere that he wanted to go. Turner then stated that he was "going to kill . . . [Smith] for snitching on [him]." He then shot Smith, who was then still living, helpless and "gurgling," twice in the chest. One of these shots was in the lungs, one in the heart. Officer Bain was then able to disarm and subdue Turner. Smith died of the wounds in his chest.

I

We turn now to the several issues raised on appeal. First, Turner contends that the district court erred in upholding the trial court's refusal to permit examination of the jury on voir dire concerning racial prejudice. He contends that because he is black and the murder victim was white the trial court should have questioned jurors about the existence of racial prejudice, and that his constitutional rights to a fair trial were violated by the court's refusal.[4]

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[4] Turner's counsel requested that the jurors be asked the following:

> The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will those facts prejudice you against Willie Lloyd Turner or

A criminal defendant such as the defendant here has a constitutional right under the Sixth and Fourteenth Amendments to the Constitution to be tried by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). This does not entitle the defendant, however, to examine jurors on voir dire about every matter that may prejudice a juror against the defendant. But, where special circumstances exist, a criminal defendant may have a constitutional right to have veniremen questioned on racial prejudice. *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976).

The Supreme Court found such special circumstances in *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973). Ham, a black man, was convicted in a South Carolina court of possession of marijuana. His defense at trial was that he was framed by law enforcement officials because of his civil rights activities. Ham was known throughout the community for his civil rights work. The trial court refused to question the jurors about possible racial prejudice against Ham. The Court found a due process violation in the trial court's failure to interrogate the jurors on the issue of racial bias.

Three years after its decision in *Ham*, the Supreme Court refused to create a per se rule requiring voir dire on racial prejudice in any case where the defendant is of a different race from the victim. *Ristaino v. Ross*, *supra*. Ross, a black male, was tried in a Massachusetts court for armed robbery, assault and battery with a dangerous weapon and assault and battery with the intent to commit murder. The victim was a white security guard. The Court rejected the court of appeals' decision that such voir dire should be required because the case involved a violent crime committed by a black against a white security guard. Such a holding, the

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affect your ability to render a fair and impartial verdict based solely on the evidence?

Court said, interpreted *Ham* too broadly. *Ham* represented a fact specific situation in which racial issues were "inextricably bound up with the conduct of the trial." *Ristaino, supra*, 424 U.S. at 597, 96 S.Ct. at 1021. The Court concluded that the mere fact that the victim was white and the defendant was black was less likely to distort the trial than were the special factors present in *Ham*. "The circumstances did not suggest a significant likelihood that racial prejudice might infect Ross' trial." 424 U.S. at 598, 96 S.Ct. at 1022. Thus, voir dire on racial prejudice was not constitutionally mandated.

Turner contends that his case involves special circumstances requiring voir dire on racial prejudice because he is charged with capital murder and that in and of itself is a special circumstance. He also contends that defendants who murder whites are more likely to be sentenced to death and therefore a special circumstance is created by this likelihood.

We reject both contentions. There must exist some special circumstance in the facts surrounding a particular case before such voir dire is constitutionally required. We are of opinion that the nature of the crime or punishment itself is not a special circumstance. Nor is the fact that the victim is white and the defendant black, as *Ristaino* specifically so held. We are also of opinion that the fact that a larger percentage of white victims' assailants are executed than are other races is not a special circumstance. "There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups." *Rosales-Lopez*, infra, 451 U.S. at 190, 101 S.Ct. at 1635.

An even more recent pronouncement from the Supreme Court involving a Mexican defendant confirms that "[o]nly when there are more substantial indications [than a victim of one race and the defendant of another or a defendant of any particular race] of the likelihood of racial or ethnic prejudice affecting the jurors in a

particular case does the trial court's denial of a defendant's request to examine the juror's ability to deal impartially with the subject amount to an unconstitutional abuse of discretion." *Rosales-Lopez v. United States*, 451 U.S. 182, 190, 101 S.Ct. 1629, 1635, 68 L.Ed.2d 22 (1981).

The broad inquiry in each case must be ". . . whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be 'indifferent as [they stand] unsworne.'" *Ristaino*, 424 U.S. at p. 596, 96 S.Ct. at p. 1021. An examination of all of the circumstances presented here does not indicate there was a constitutionally significant likelihood that absent questioning about racial prejudice the jurors would not be indifferent as they stood unsworn. As Turner concedes, there is nothing special in the facts surrounding this case to suggest racial antagonism. That being true, the trial court did not commit constitutional error by refusing to ask the jurors the question copied in footnote 4 in the margin.

II

Turner next contends that the exclusion of juror Samuel Cypress for cause violated his Sixth and Fourteenth Amendment rights. Cypress was struck for cause over defense objections after the following colloquy:

> Now, Mr. Cypress, do you have any religious or conscientious scruples or objections against the imposition of the death penalty?
>
> Mr. Cypress: Well, really, I don't go for the death penalty.
>
> The Court: Can you say yes or no to that question?
>
> Mr. Cypress: No.
>
> The Court: Or yes?

Mr. Cypress: Do I have any objection?

The Court: Yes.

Mr. Cypress: Yes.

The Court: Is your objection to the death penalty absolute?

Mr. Cypress: Well, I would say yes.

The Court: Could you in a proper case impose the death penalty?

Mr. Cypress: Didn't hear.

The Court: Could you in a proper case impose the death penalty?

Mr. Cypress: Well, I can't see where it helps any.

Turner argues that Cypress' responses do not show that he was irrevocably committed before trial to vote against the death penalty. In particular, Turner challenges the Virginia court's interpretation of Cypress' response that he did not see that it helped any when queried about whether he could impose the death penalty.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and again in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court held that the State may strike for cause jurors whose opposition to the death penalty would prevent them from considering all the penalties provided by state law. That opposition must be such as to lead the juror to either ignore the law or violate his oath as a juror. The fact that a juror may be opposed to the death penalty does not provide grounds to strike him for cause as long as he would consider imposition of the death penalty in an appropriate case.

In this case, the state trial judge, after questioning Cypress and observing his demeanor, determined that cause existed to strike him from the jury panel. The

district court refused to disturb the trial judge's findings, and we agree.

Under 28 U.S.C. § 2254(d), factual findings such as those of a state trial court [5] are presumed to be correct in a habeas corpus action in federal court unless among other things not applicable here, those determinations are not fairly supported by the record. That standard applies to our consideration of Cypress' qualification to serve on the jury. In *Patton v. Yount*, —— U.S. ——, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), a case involving the partiality of a juror, much the same question as that presented here, the Court decided that, on habeas corpus review, when the question was whether or not a juror could set aside an opinion, the presumption of § 2254(d) applied, and that "special deference" should be given to the finding of the trial court. The Court held that the juror in question was properly seated despite some ambiguous answers, much as here. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially." at ——, 104 S.Ct. at 2893.

The question we must address therefore is whether there is fair support in the record for the trial court's conclusion that Cypress' opposition to the death penalty was absolute. We hold that the record supports that conclusion. Cypress stated that he opposed imposition of the death penalty. Following further questioning, Cypress said that this opposition was absolute. While his response to the trial judge's last question may have been ambiguous, such ambiguity has been resolved by the trial judge whose ". . . resolution of such questions is entitled, even on direct appeal, to special deference." at ——, 104 S.Ct. at 2892. The trial judge asked the proper questions re-

[5] The trial court's finding was specifically affirmed by the Virginia Supreme Court. 273 S.E.2d at p. 43.

quired by *Witherspoon* and *Adams*. He was in the best position to observe Cypress' demeanor and intonation during voir dire. We refuse to disturb his decision that Cypress' opposition to the death penalty was absolute.

We do not construe *Keeten v. Garrison*, 742 F.2d 129 (4th Cir., 1984), to require us to make a de novo review of Cypress' qualification to serve on the jury, as Turner argues. Rather, we think it is consistent with *Patton*. But, assuming arguendo Turner's construction of *Keeten*, our holding would be the same. The trial judge could have reasonably concluded, after considering Cypress' responses in toto that he could not consider imposition of the death penalty in the proper circumstance, and we think his finding is supported by the record.

III

As Turner notes in his brief, this court's recent opinion in *Keeten* precludes his argument that his constitutional right to an impartial jury was violated because a death qualified jury is claimed to be biased in favor of the prosecution. *Keeten* was recently reaffirmed by this court in *Briley v. Booker*, (1984).

IV

Turner claims error in the district court's denial of an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial. He does not claim ineffective assistance at the stage of the trial ascertaining guilt or innocence. The district court found that Turner's trial was not a case in which counsel had failed to present any evidence, or only evidence of marginal value, and concluded that Turner's attorneys had presented evidence of his psychological history and mental state at the time of the murder, which are matters in mitigation specifically included in Virginia Code § 19.2-264.4. It concluded that counsel had complied with the standard set out in *Marzullo v. Mary-*

land, 561 F.2d 540 (4th cir. 1977), cert. den. 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), and that no evidentiary hearing was required. We agree.

When a habeas petitioner presents facts which, if proved, would entitle him to habeas corpus relief, a federal court can receive that evidence at a hearing. *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963). An evidentiary hearing in a federal habeas corpus proceeding is required only if the habeas as petitioner establishes one or more of the enumerated criteria of 28 U.S.C. § 2254(d) or in *Townsend*, supra, at 312-318, 83 S.Ct. at 756-759. *Shaw v. Martin*, 733 F.2d 304 (4th Cir. 1984). Where a state court has decided the merits of a claim but made no express findings of fact, the district court may be able to reconstruct those findings without a hearing. Of course no hearing is required if the facts alleged by the petitioner and assumed to be true are insufficient to support a claim.

On appeal, Turner confines himself wholly to the defense attorneys' treatment of the psychological evidence at the penalty stage of the trial, if we include the side claim that the attorneys did not produce "the corroborating evidence necessary to make credible a psychological or mitigating defense." To place this contention in proper perspective, a brief review of the claim is in order. Following Turner's conviction, he employed other counsel to prosecute his appeal. These are the same attorneys who are presently in the case. They have represented Turner at least since May 1980, the date of filing of Turner's brief in the Supreme Court of Virginia in the appeal of the criminal conviction.

Following affirmance of Turner's conviction, he filed a petition for habeas corpus in the state court. So far as concerns us here, the only pertinent contention there made was that "counsel failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities." That petition was dismissed and no written elucidation or ex-

planation of the contention was ever brought to the attention of the trial court prior to its order of February 10, 1982, dismissing the petition. On April 6, 1982, however, Turner's attorneys filed a paper with the trial court giving their version of the statement of facts, including what took place at the hearing. The Commonwealth did likewise. On June 3, 1982, the trial judge signed a statement of facts which included the fact that at oral argument petitioner's attorneys had proffered that the defense attorneys had not consulted any psychiatrist other than Dr. Bransfield and that the defense attorneys had not adequately researched capital murder statutes in other jurisdictions regarding the definition and application of the mitigating factors set forth in Virginia Code § 19.2-264.4B. This latter finding, however, does not concern us here in view of the course the trial and this appeal have taken. The Virginia Supreme Court denied a petition for appeal from the trial court's dismissal of the habeas corpus petition on January 11, 1983. In that order it relied on *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), and *Marzullo*, supra. The Supreme Court of the United States denied certiorari, —— U.S. ——, 103 S.Ct. 2465, 77 L.Ed.2d 1341 (1983).

Next, Turner applied for federal habeas corpus relief in the district court in the Eastern District of Virginia in the case at hand. In his petition, the allegations quoted above from the petition in the state court were copied *in haec verba*. That petition was likewise dismissed. The first time that any mention was ever made in this case of any missing witness with respect to the sentencing phase of the case, or failure to consult another psychiatrist, or any other failure with respect to the treatment of the psychiatric evidence, was when a motion was made on July 2, 1984 to alter or amend the judgment of the district court. At that time it was claimed that the defense attorneys should have called Turner's younger sister, his uncle, and two people who would say that they were will-

ing to back Turner in opening a barber shop after release from prison. Also, Turner then filed his affidavit seeking to explain the circumstances surrounding his earlier crimes, together with some documents corroborating some good incidents in his career while imprisoned.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). It is by that standard that Turner's attorneys are to be measured.

So, we examine the attorneys' actions with respect to the psychiatric testimony. To begin with, they moved the court that they be permitted to employ a private psychiatrist to examine Turner. The court instead appointed a certain Dr. W.F. Daughtrey, Jr., a general practitioner, to examine and evaluate Turner and to make a report in writing to the court and to the attorneys in accordance with then effective § 19.2-169 of the Code of Virginia. Dr. Daughtrey reported that in his opinion Turner was mentally competent to stand trial. Being of opinion, however, that more extensive examination, evaluation and observation was desirable, the court then committed Turner to Central State Hospital, a mental hospital, for additional examination, evaluation and observation. The hospital was ordered to report to the court and to the attorneys, which it did. While there, Turner underwent psychiatric, psychological and sociological evaluation by the staff. The report from Central State Hospital was that Turner suffered from personality disorders and anti-social personality, each mild. It recommended that he be returned to the court for disposition of the pending charges. Turner's attorneys persisted, however, that Turner needed further examination, and the court ordered that the attorneys be permitted to employ Dr. Bransfield.[6] Dr.

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[6] We note that the orders for the various psychiatric examinations of Turner were entered by the General District Court before Turner was indicted. In Virginia, the General District Court in the usual

Bransfield, after examination of Turner and after psychological testing by Dr. Erwin F. Sacks, PhD and one of Dr. Bransfield's associates, submitted a long and detailed report to the effect that Turner was competent to stand trial. While Dr. Bransfield did not feel that Turner had schizophrenia, he was of opinion that a few psychiatrists would diagnose Turner as having latent schizophrenia. He also was of opinion that Turner in times of stress might display paranoid tendencies but that Turner had not shown a paranoid psychosis. He also thought that Turner had an anti-social personality and was not under an irresistible impulse at the time of the murder.

At the sentencing phase, Turner called one of the psychiatrists who had examined him, Dr. Bransfield, as well as his mother, his cousin and his aunt. He also called Officer Bain and the police chief. The officers were obviously called to prove that Turner was placed in a position of stress upon finding out that the silent alarm had been set off and upon the appearance of Officer Bain. The family witnesses, of course, had good things to say about Turner, how he was good to his family and had had a very disadvantaged childhood. His mother also testified, in corroboration of Dr. Bransfield, that at or about the time of the shooting she had had to call the local police about an incident at home and that she had told the police that Turner needed treatment for his mind. She said that he had been in a daze and that she was afraid that he might hurt somebody if they would push him. Dr. Bransfield had testified that if Turner believed he was cornered he might react in a violent way and he felt that if Turner had had treatment at the time of the shooting that Smith would not have been killed.

Dr. Bransfield, all in all, was quite a good witness for Turner. The gist of his testimony is contained in one of his answers on cross-examination:

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course of things has jurisdiction to ascertain probable cause and decide whether a defendant will be bound to a grand jury. Circuit Courts are the trial courts of general jurisdiction.

> "He had psychotic symptoms which were present for at least three weeks before July 12th [the day of the murder]. I could list what those symptoms are. They seemed to influence his behavior. I could not prove—there was no evidence that I could show that his shooting Mr. Smith was fully and completely a psychotic act; however, I do feel that he was affected by psychotic problems which impaired his ability to perform in a rational manner and the symptoms that he had, I could list."

Earlier, the conclusion of Dr. Bransfield's direct examination was as follows:

> Q . . . [D]o you have an opinion with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance?
>
> A Yes, I do have an opinion.
>
> Q And what is that opinion, sir?
>
> A That I feel he was under the influence of mental disturbance while he was committing the crime.

Thus, Dr. Bransfield's testimony tended to show one of the facts which may tend to show mitigation specifically mentioned in the Virginia statute, "the influence of extreme mental or emotional disturbance," and also touched upon another like statutory factor, "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." See Va.Code § 19.2-264.4. In view of Dr. Bransfield's testimony, it is seen that the contention in both petitions for habeas corpus, that the attorneys "failed to develop and present adequately the psychiatric evidence sufficient to support a finding of the presence of mitigating mental abnormalities," is little better than frivolous. The evidence was there for the jury to consider. The jury simply chose not to found its verdict upon that mitigating circumstance.

The claim now made on appeal is that Turner's attorneys "mishandl[ed]" "the psychiatric testimony and mitigating evidence" which was "essentially a product of ignorance." The claim goes that the attorneys "did not know the diagnostic implications or the potential dangers from cross examination of a diagnosis of anti-social personality;" they "had not discussed with Dr. Bransfield the definitions of the mitigating and aggravating circumstances on which he would be expected to comment;" and "did not acquire the degree of expertise in psychiatric matters necessary to fully develop the psychiatric defense."

The record belies the charges. The attorneys had caused three examinations of Turner, the preliminary examination by a general practitioner and two by psychiatric experts. While we are not told what are the diagnostic implications or potential dangers from cross examination of a diagnosis of an anti-social personality, the attorneys were obviously prepared to have more than one psychiatrist testify, for they so advised the court in the record. Dr. Bransfield's testimony was as good as it could have been. We think Turner's attorneys, in handling the psychiatric defense, did a professional job in every sense of the word. They had a good witness who testified as favorably in Turner's behalf as could have been wanted. Their examination of the witness was conducted in a skillful and knowledgeable manner. We are thus of opinion that their performance in Turner's behalf was reasonable under prevailing professional norms. Turner's present reliance on other possible theories of defense are nothing more than afterthoughts, we think, brought into play after the best defense, that of direct evidence on the direct question involved, had been tried but found wanting through no fault of the attorneys. The question of Turner's state of mind and the degree of his responsibility for his acts at the time of the shooting was purely a jury question. By its verdict the jury simply found that the mitigating factors were insufficient, a matter entirely

within its province. No fault of any kind can be laid to the attorneys for this result.[7]

V

Turner challenges the use of the vileness criterion in this case as being violative of his rights under the Eighth and Fourteenth Amendments to the Constitution.

Under Virginia law the death penalty may be imposed upon a defendant if the jury finds beyond a reasonable doubt that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; [the dangerousness criterion] *or* that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim" (the vileness criterion) Va.Code § 19.2-264.4C (emphasis added).

The Virginia Supreme Court has construed the vileness component of § 19.2-264.4C to include three separate and distinct features, those being torture, depravity of mind or aggravated battery. Proof of only one of these factors is sufficient to support a sentence of death. *Bunch v. Commonwealth*, 225 Va. 423, 432, 304 S.E.2d 271 (1983). Even more importantly, the Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Aggravated battery is "a battery which qualitatively and quantitatively is more

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[7] With respect to the claim that the attorneys should have shopped around for another psychiatrist, we have excluded that ground in *Barfield v. Harris*, 719 F.2d 58, 63 (4th Cir. 1983), affirming 540 F.Supp. 451 (E.D.N.C. 1982), and we do not think the claim has any validity here.

culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978).

The jury here was given a verdict form setting out both statutory aggravating factors (dangerousness and vileness) connected by the conjunctive "and/or". The jury unanimously imposed a sentence of death,[8] returning the verdict form without striking either the "and" or the "or".[9] Thus, this case differs from *Briley v. Bass*, 742 F.2d 155 (4th Cir. 1984), where the jury struck the word "or" and unanimously found both aggravating factors. There, the court did not need to consider a similar constitutional attack on the vileness criterion of § 19.2-264.4C because the dangerousness criterion was sufficient. *Briley* at pp. 165-166. Because we cannot be sure which factor the jury relied upon in awarding the death sentence in this case, we consider Turner's attacks on the vileness criterion.[10]

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[8] The jury verdict read as follows:

> "We, the Jury, on the issue joined, having found the defendant guilty of Capital Murder of W. Jack Smith, Jr., as charged in the Indictment, and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and/or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death."

[9] We agree with the Virginia Supreme Court that the better practice would be for the trial court to poll the jury as to which aggravating factor they found. *Turner*, supra, 273 S.E.2d at 45 n. 12.

[10] Turner does not challenge the dangerousness criterion. There is ample evidence in the record to support such a verdict. *Turner*, supra, 273 S.Ed.2d at 44 n. 11 and 273 S.E.2d at 45.

Turner does not attack the constitutionality of this aggravating factor on its face, as that issue has been disposed of in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct 2909, 49 L.Ed.2d 859 (1976). Instead, he attacks its constitutionality as applied to him, relying upon *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion).

In *Godfrey* the Supreme Court reversed the imposition of the death penalty in a capital murder case because the Georgia vileness criterion was unconstitutionally applied to the defendant. Godfrey had been having marital problems with his wife of 28 years. He had a history of a drinking problem and violent behavior toward his wife. Godfrey's wife had left him and had filed suit for divorce. His attempts at reconciliation were rebuffed. Mrs. Godfrey moved in with her mother, who Godfrey felt encouraged the separation.

One evening immediately after arguing with his wife over the telephone, Godfrey took his shotgun and walked a short way to his mother-in-law's home. He peered through the window and saw his wife, his 11 year old daughter, and his mother-in-law. He immediately shot his wife in the forehead, killing her instantly. He then entered the trailer and struck and injured his daughter. He then fired one shot at his mother-in-law, hitting her in the head and killing her instantly. Godfrey immediately called the police, surrendered and confessed to the murders. 446 U.S. 424-426, 100 S.Ct. 1763-1764.

Godfrey was found guilty of two counts of murder and one count of aggravated assault. He was sentenced to death under Georgia's statute providing as aggravating circumstances that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." [11] At the sentencing stage of trial, the

[11] This language is identical to that of Va.Code § 19.2-264.4C.

prosecutor conceded that the case did not involve torture or aggravated battery. The jury found that "the offense of murder was outrageously or wantonly vile, horrible or inhuman." The Georgia Supreme Court affirmed the imposition of the death penalty.

The Supreme Court reversed. The Court first noted that a State's sentencing scheme must provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 427, 100 S.Ct. at 1764, quoting *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 (White, J. concurring). The sentencer must be given clear and objective standards to follow in the application of the death penalty. Those "specific and detailed" guidelines enable the courts to rationally review the sentence imposed.

The Court found no such guidance present in *Godfrey*. Nothing in the words "outrageously or wantonly vile, horrible or inhuman" alone distinguished this murder from others not eligible for the death penalty. The Court reached this conclusion after reviewing Georgia case law giving the phrase a limited construction that required a demonstration that the offense involved torture, depravity of mind or aggravated battery. Depravity of mind had been defined in Georgia to mean the state of mind leading to torture or aggravated battery. But in Godfrey's case the prosecution had conceded that no torture or aggravated battery was present. Thus, the murders did not fit within the limiting criteria set out by the Georgia Supreme Court.

The Court held in *Godfrey* that the phrase "outrageously or wantonly vile, horrible or inhuman" in and of itself had not been given a constitutional construction by the Georgia Supreme Court. The Court concluded that "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family

who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes." Id. 446 U.S. at 433, 100 S.Ct. at 1767.

On direct appeal, the Virginia Supreme Court rejected Turner's argument that *Godfrey* required reversal of his death sentence. It construed the statute to require not only outrageously or wantonly vile, horrible or inhuman conduct, but also that such conduct involve either torture, an aggravated battery of the victim, or the perpetrator's depravity of mind. The Court then found, applying its limiting precedent of *Smith v. Commonwealth*, that the evidence established an aggravated battery which is a " 'battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder.' " 248 S.E.2d at 149; 273 S.E.2d at 45. The court then found that, in all events, the dangerousness criterion of the statute had been met. Turner had been convicted previously of malicious maiming, escape, unlawful wounding, malicious wounding, and second degree murder, four of the offenses occurring while he was in prison. The validity of this finding is not questioned on appeal.

We agree with the analysis by the Virginia Supreme Court. The fatal weakness in *Godfrey* was the unconstitutionally broad construction given the vileness criterion in the absence of both torture and aggravated battery by the Georgia Supreme Court. That weakness is not present here. The Virginia Supreme Court has given a limited construction to the vileness criterion and applied that limited construction here.

We also note that the facts of this case are not even similar facts to those upon which the Supreme Court relied in *Godfrey*. In contrast, the murder here was cold-blooded and calculated, involving no element of emotional trauma as was present in *Godfrey*. Turner initially shot Smith for no reason at all. While Smith lay alive but helpless and while Officer Bain pleaded, Turner fired two

shots into Smith's chest after stating that he was going to kill him for snitching on him. No comparison can be drawn between the facts of *Godfrey* and the deliberate malicious murder presented in this case. We reject Turner's contention that his crime was not so vile as to justify the imposition of death. The case fits within the constitutionally limited construction of the vileness criterion established by the Virginia Supreme Court, and we are of opinion Virginia's death penalty provisions were constitutionally applied.

On a related subject, we find no constitutional deficiency in the instructions given to the jury at the sentencing stage of the trial. The instructions set out the appropriate mitigating factors of § 19.2-264.4, and the jury was also instructed as to the limiting definition of aggravated battery as expressed in *Smith*. The trial judge carefully instructed the jury that "[w]here the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty." We do not think that *Godfrey* requires that a jury be instructed on each term in the aggravating circumstances. We see no reason why this jury should not have understood the terms of the instructions given. *Cape v. Francis*, 741 F.2d 1287 (11th Cir.1984).

The constitutional flaw of *Godfrey*, the Georgia Court's failure to give a constitutional construction to the vileness criterion, is not present here. The Virginia Court has limited the breadth of the criterion in such a manner that its application here was neither arbitrary nor capricious.[12] The jury was properly instructed. Nothing else was constitutionally required.

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[12] The Virginia Supreme Court has consistently applied the limiting provisions of *Smith v. Commonwealth*, supra, in its review of cases involving the death penalty. *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984) (aggravated battery and de-

VI

While deliberating on the sentence to be imposed, the jury returned and asked the judge what life imprisonment entailed. The judge responded that the jury must consider only the two alternatives set out in the instructions, those being death or life imprisonment.

Turner contends that the due process requires that the jury be instructed that a prisoner may be entitled to parole and that the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society.

It is settled that such an instruction is not permissible under Virginia law. *Clark v. Commonwealth*, supra; *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978).

In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the Court upheld as constitutional a California law requiring that a jury in a capital case be instructed of the governor's power to commute a sentence of life without the possibility of parole. The Court made clear that while such disclosure is constitutionally permissible it is not constitutionally required. It also upheld the failure or refusal of the trial court to instruct the jury on the governor's power to commute a death sentence. In arriving at its decision, the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.[30]" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the

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pravity of mind); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983) (aggravated battery and depravity of mind); *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982) (aggravated battery); *(James) Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980) (aggravated battery and depravity of mind); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (depravity of mind).

possibility of commutation, pardon or parole." Id. at ——, 103 S.Ct. at 3459. While not exactly on point, we think *Ramos* indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold. Accord *O'Bryan v. Estelle*, 714 F.2d 365, esp. 389 (5th Cir. 1983).

We have considered each of the issues raised by Turner in his appeal and find that he had a constitutionally fair trial.

Our stay of the state court's order to impose its sentence is hereby dissolved.

The judgment of the district court is AFFIRMED.

JAMES DICKSON PHILLIPS, Circuit Judge, specially concurring:

I concur in the judgment and in all of the opinion except that part dealing with the claim of due process denial in refusing to question prospective jurors about the possibility of racial bias. On that point I believe the majority opinion puts too restrictive a reading on the circumstances that may entitle a criminal defendant, as a matter of due process, to have prospective jurors so questioned. But because I further believe that the circumstances giving rise to the right were not demonstrated here under a proper application of the principle, I concur in the court's conclusion that no due process denial was established.

As I read *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981); *Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); and *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973), in conjunction, they yield the following principles.

The fact alone that defendant is of a different race than the crime victim is not a circumstance giving rise

to the due process right, *Ristaino*, 424 U.S. at 596, 597, 96 S.Ct. at 1021, 1022; nor is this altered by the nature of the crime charged or the punishment possible, *see Ristaino*, 424 U.S. at 596 n. 8, 96 S.Ct. at 1021 n. 8 (generally rejecting *per se* approach based upon non-case-specific factors such as violent nature of crime). But special circumstances giving rise to the right may be present in a case in which racial issues are "inextricably bound up with the conduct of the trial." *Id.* at 597, 96 S.Ct. at 1021 (so interpreting basis of right recognized in *Ham* where racial prejudice against defendant was raised as defense on the merits). And, aside from specific trial issues, "more substantial indications [than race differences alone] of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case" may trigger the right. *Rosales-Lopez*, 451 U.S. at 190, 101 S.Ct. at 1635 (dicta: constitutional test stated in applying broader supervisory rule for federal courts); *see also Ristaino*, 424 U.S. at 598, 96 S.Ct. at 1022 (constitutional right might arise not only from specific trial issues but from "racial factors . . . of comparable significance").

But as I read the majority opinion, it reads these decisions more restrictively in holding that only "special circumstances in the facts surrounding a particular trial" invoke the constitutional right, and that "the fact that a larger percentage of white victims' assailants are executed" may not be such a special circumstance. If by this the majority is saying that only when *Ham*-type racial issues are bound up in the merits of a criminal trial can the due process right arise, I cannot agree. Obviously, if this were correct, it would follow that factors related solely to likely juror attitudes independent of specific issues in a particular case—including statistical demonstrations of jury propensities—would always be irrelevant.

But, as indicated, I do not read the authoritative Supreme Court decisions to limit the right to *Ham*-type

situations. I believe that not only specific racial issues in the particular case but a demonstrated likelihood of racial prejudice affecting the "particular" jury, irrespective of specific issues, may invoke the constitutional right. And I would not be prepared flatly to rule out as possible means, among others, of demonstrating such a likelihood scientifically sound statistical evidence related to community attitudes as reflected in jury performance in sufficient samples of comparable cases.

But to demonstrate that such a propensity was sufficiently likely to afflict the "particular" jury in a given case, I think the evidence offered—whatever its source and content—would have to be much more focussed in time and geographical terms upon the very community from which the particular jury venire is drawn than was the evidence here advanced by Turner. That evidence consisted only of the following:

> (1) A study by Bowers and Pierce of post-*Furman v. Georgia* data collected through December 1977 from Georgia, Florida, Texas, Alabama and Ohio, which revealed that 14.59% of blacks killing whites received the death penalty, compared to 2.66% of whites killing whites, 0.54% of blacks killing blacks, and 0.50% of whites killing blacks;
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> (2) a 1983 study by Gross and Mauro of data through 1980 from Oklahoma, North Carolina, Mississippi, Virginia and Arkansas. The Virginia data focused on 19 cases out of 1389 criminal homicides, these cases being chosen to control for attitudes about the degree of atrocity involved in the homicide. The statistical analysis of Virginia data showed 8.2% of blacks killing whites receiving the death sentence compared to 1.3% of the whites killing whites and 0.60% of blacks killing blacks. No white had received the death penalty for killing a black under Virginia's 1977 capital punishment statute.

This evidence, whatever its general statistical reliability as a measure of community attitudes over the wide expanses of area and time covered, is simply too diffused in its depiction of likely community, hence juror, attitudes in this particular case to invoke the right. But I am not prepared to hold, as I think the majority opinion implies, that the requisite likelihood, hence the due process right, can never be shown by statistically sound evidence of particular community attitudes as reflected in sufficiently contemporary jury verdicts in comparable situations.